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THE LAW REPORTS

[1904] 2 King's Bench

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1904.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS ON

CROWN CASES RESERVED

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

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1904.

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JUDGES

OF

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE.

1904.

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The Hon. Sir WILLIAM GRANTHAM, Knt.
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ERRATA.

Page	*Line*	*For*	*Read.*
10	first line of text	defendants other than Burnand	plaintiffs.
161	5 of head-note	[1900] 1 Q. B. 147	[1891] 1 Q. B. 147.
343	foot-note (5)	(1894) 1 Ir. Rep. 153	[1894] 1 I. R. 153.
487	foot-note (7)	10 C. B. 845	10 Ex. 845.

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TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Abrahams, Rex *v.*	859
Akrokerri (Atlantic) Mines, Ld. *v.* Economic Bank	465
Aldrich *v.* British Griffin Chilled Iron and Steel Company (C. A.)	850
Alianza Company *v.* Bell	666
Allison, Johnson & Foster, Ld., In re. Ex parte Birkenshaw	327
Allott, Wells *v.* (C. A.)	842
Anderson, Mary Clark Home (Trustees of) *v.*	645
Andrew *v.* Failsworth Industrial Society (C. A.)	32
Anglo-Austrian Bank, Embericos *v.*	870
Ashton *v.* Lancashire and Yorkshire Railway Company	313
Atkin Brothers, Ex parte. In re William Watson & Co. (C. A.)	753
Attorney-General *v.* London County Council	635

B.

	PAGE
Bagshaw, Brooks *v.*	798
Baker, Sutton & Co., Ex parte. In re Burnand (C. A.)	68
Ballard, Millett *v.* (C. A.)	593
Bank of Scotland, Logan *v.* (C. A.)	495
Barque Quilpué, Ld. *v.* Brown (C. A.)	264
Barraclough, Sykes *v.*	675
Bateman *v.* Hunt (C. A.)	530
Bath (Recorder of), Rex *v.*	570
Beal, Morris *v.*	585
Bell, Alianza Company *v.*	666
——, Goerz & Co. *v.*	136
Bermondsey Guardians, Fitch *v.*	709
Birkenshaw, Ex parte. In re Allison, Johnson & Foster, Ld.	327
Birmingham Union, Tewkesbury Union *v.*	395
Bolland *v.* Young (C. A.)	824
Bonzoline Manufacturing Company, Ex parte. In re John Roberts & Co. (C. A.)	299

PAGE

Bow *v.* Hart 693
Brass *v.* London County Council 336
British Griffin Chilled Iron and Steel Company, Aldrich *v.* (C. A.) 850
British North Borneo Company, Hubback *v.* (C. A.) 473
British Thomson Houston Company, Maxwell *v.* 342
Brooks *v.* Bagshaw 798
Brown, Barque Quilpué, Ld. *v.* (C. A.) 264
Browne, In re. Ex parte Martingell 133
Burnand, In re. Ex parte Baker, Sutton & Co. (C. A.) 68
———, Hambro *v.* (C. A.) 10
Burnell's Vienna Bakery Company, Robinson *v.* 624
Bushell *v.* Hammond (C. A.) 563

C.

Campbell, Ld., Owens *v.* (C. A.) 60
Caswell & Bowden, Ld., Great Western Railway Company *v.* 508
Chambers, Tower Justices *v.* (C. A.) 903
Charles Bright & Co., Ld., Sellar *v.* (C. A.) 446
Charles Duval & Co., Ld. *v.* Gans (C. A.) 685
Chelsea Waterworks Company *v.* Metropolitan Water Board (C. A.) 77
Cheney *v.* Tallowin 763
Chester-le-Street Co-operative Society, Weardale and Consett Water Company *v.* 240
Clough, Ex parte. In re Reis (C. A.) 769
Cooper *v.* Hawkins 164
Corbett *v.* Pearce 422
Cox, Rigby & Co. *v.* (No. 2) 208

PAGE

Cycle Trade Publishing Company, Joynt *v.* (C. A.) 292

D.

Dauney, Smith *v.* 186
David *v.* Rees (C. A.) 435
Derenburg & Co., Ex parte. In re Rowe (C. A.) 483
Dixon, Rouse *v.* 628
Dudbridge Ironworks Company, Stephens *v.* (C. A.) 225
Durham Joint Committee, Garbutt *v.* (C. A.) 514
Dyer *v.* Swift Cycle Company (C. A.) 36

E.

Eccles Corporation, Thompson *v.* 1
Economic Bank, Akrokerri (Atlantic) Mines, Ld. *v.* 465
Embericos *v.* Anglo-Austrian Bank 870
Escott *v.* Newport Corporation 369
Everson, In re. Ex parte The Official Receiver 619

F.

Failsworth Industrial Society, Andrew *v.* (C. A.) 32
Farrow, Hammond *v.* 332
Firth & Sons, Ld. *v.* Inland Revenue Commissioners 205
Fitch *v.* Bermondsey Guardians 709
Fordham, Polley *v.* 345
Foster *v.* Great Western Railway Company 306
Franklin, Horner *v.* 877
Fraser *v.* Fraser 245
Friern Barnet Urban Council, Haedicke *v.* 807
Fulham Borough Council, Heaver *v.* 383

PAGE

Fuller, Westminster Corporation *v.* (C. A.) 737

G.

Gans, Charles Duval & Co., Ld. *v.* (C. A.) 685
Garbutt *v.* Durham Joint Committee (C. A.) 514
Gaskell, In re (C. A.) 478
Gibson *v.* Wormald & Walker, Ld. (C. A.) 40
Giddy, Smith *v.* 448
Goerz & Co. *v.* Bell 136
Goldberg, Rex *v.* 866
Goldstein *v.* Hollingsworth 578
Gorton Local Board *v.* Prison Commissioners 165, n.
Grand Junction Waterworks Company *v.* Rodocanachi 230
Graves & Co., Lomas *v.* (C. A.) 557
Great Fingall Consolidated, Ruben *v.* (C. A.) 712
Great Western Railway Company *v.* Caswell & Bowden, Ld. 508

Company, Foster *v.* 306

Company, Johnston *v.* (C. A.) 250
Greaves, In re. Ex parte Official Receiver 493
Green & Co., Jones, Ld. *v.* (C. A.) 275
Gwendolen Freehold Land Company *v.* Wicks 622

H.

Hackney Corporation *v.* Lee Conservancy Board (C. A.) 541
Haedicke *v.* Friern Barnet Urban Council 807
Hagmaier *v.* Willesden Overseers 316
Hall *v.* Lees (C. A.) 602

PAGE

Hambro *v.* Burnand (C. A.) 10
Hamilton *v.* Seal (C. A.) 262
Hammond, Bushell *v.* (C. A.) 563
———— *v.* Farrow 332
Hampstead Corporation *v.* Midland Railway Company 802
Hart, Bow *v.* 693
Hawkins, Cooper *v.* 164
Heaver *v.* Fulham Borough Council 383
Hodson *v.* Railway Passengers' Assurance Company (C. A.) 833
Holbeach Union, West Ham Union *v.* (C. A.) 121
Hollingsworth, Goldstein *v.* 578
Horner *v.* Franklin 877
Howkins, Rainbow *v.* 322
Hubback *v.* British North Borneo Company (C. A.) 473
Humphris, Rex *v.* (C. C. R.) 89
Hunt, Bateman *v.* (C. A.) 530
——, Skinner *v.* (C. A.) 452

I.

Illuminated Advertisements Company, London County Council *v.* 886
Inland Revenue Commissioners, Firth & Sons, Ld. *v.* 205

sioners, Prudential Insurance Company *v.* 658

sioners, Underground Electric Railways Company of London *v.* 198

J.

Jackson *v.* Wimbledon Urban Council 359
James *v.* Ocean Coal Company (C. A.) 213
Johnson, Westminster Corporation *v.* (C. A.) 737

PAGE

Johnston *v.* Great Western Railway Company (C. A.) 250
Jones, Ld. *v.* Green & Co. (C. A.) 275
Joynt *v.* Cycle Trade Publishing Company (C. A.) 292

K.

Kent Justices, Rex *v.* 349

L.

Lancashire and Yorkshire Railway Company, Ashton *v.* 313
Leadbetter *v.* Marylebone Corporation (C. A.) 893
Lee Conservancy Board, Hackney Corporation *v.* (C. A.) 541
Lees, Hall *v.* (C. A.) 602
Lennard & Sons, Ld., and Traae, In re (C. A.) 377
Livingstone *v.* Westminster Corpcration 109
Logan *v.* Bank of Scotland (C. A.) 495
Lomas *v.* Graves & Co. (C. A.) 557
London County Council, Attorney-General *v.* 635
———, Brass *v.* 336
———*v.* Illuminated Advertisements Company 886
———, Parker *v.* 501

M.

Macoun, In re (C. A.) 700
Marks *v.* Samuel (C. A.) 287
Martingell, Ex parte. In re Browne 133

PAGE

Mary Clark Home (Trustees of) *v.* Anderson 645
Marylebone Corporation, Leadbetter *v.* (C. A.) 893
Maxwell *v.* British Thomson Houston Company 342
Mayhook, Tinwell *v.* 790
Metropolitan Water Board, Chelsea Waterworks Company *v.* (C. A.) 77
Midland Railway Company, Hampstead Corporation *v.* 802
Millett *v.* Ballard (C. A.) 593
Morris *v.* Beal 585

N.

Nelson, Ogdens, Ld. *v.* (C. A.) 410
Newport Corporation, Escott *v.* 369
Norman & Burt *v.* Walder (C. A.) 27
North's Navigation Collieries (1889), Ld., Williams *v.* (C. A.) 44

O.

O. C. S., In re. Ex parte The Debtor (C. A.) 161
Ocean Coal Company, James *v.* (C. A.) 213
Official Receiver, Ex parte. In re Greaves 493
Ogdens, Ld. *v.* Nelson (C. A.) 410
———*v.* Telford (C. A.) 410
Owens *v.* Campbell, Ld. (C. A.) 60

P.

Parker *v.* London County Council 501
Pearce, Corbett *v.* 422
Pilliner, Scott *v.* 855
Pinckney, Rex *v.* (C. A.) 84
Polley *v.* Fordham 345
Ponsford, In re. Ex parte Ponsford (C. A.) 704

PAGE

Prison Commissioners, Gorton Local Board *v.* 165, n.
Prudential Insurance Company *v.* Inland Revenue Commissioners 658

R.

Railway Passengers' Assurance Company, Hodson *v.* (C. A.) 833
Rainbow *v.* Howkins 322
Rees, David *v.* (C. A.) 435
Reis, In re. Ex parte Clough (C. A.) 769
Rex *v.* Abrahams 859
—— *v.* Bath (Recorder of) 570
—— *v.* Goldberg 866
—— *v.* Humphris (C. C. R.) 89
—— *v.* Kent Justices 349
—— *v.* Pinckney (C. A.) 84
—— Yeoman *v.* (C. A.) 429
Rigby & Co. *v.* Cox (No. 2) 208
Roberts (John) & Co., In re. Ex parte Bonzoline Manufacturing Company (C. A.) 299
Robinson *v.* Burnell's Vienna Bakery Company 624
Rodocanachi, Grand Junction Waterworks Company *v.* 230
Rouse *v.* Dixon 628
Rowe, In re. Ex parte Derenburg & Co. (C. A.) 483
——, In re. Ex parte West Coast Gold Fields, Ld. 489
Ruben *v.* Great Fingall Consolidated (C. A.) 712

S.

St. Marylebone Union, South-West Suburban Water Company *v.* 174
Samuel, Marks *v.* (C. A.) 287
Scott *v.* Pilliner 855
Seal, Hamilton *v.* (C. A.) 262
Sellar *v.* Charles Bright & Co., Ld. (C. A.) 446

PAGE

Shaw, Son & Co. and Walkers, Winser & Hamm, In re 152
Skinner *v.* Hunt (C. A.) 452
Smith *v.* Dauney 186
—— *v.* Giddy 448
Solomons, In re. Ex parte Solomons 760
—— (C. A.) 917
South-West Suburban Water Company *v.* St. Marylebone Union 174
Stephens *v.* Dudbridge Ironworks Company (C. A.) 225
Swift Cycle Company, Dyer *v.* (C. A.) 36
Sykes *v.* Barraclough 675

T.

Tallowin, Cheney *v.* 763
Telford, Ogdens, Ld. *v.* (C. A.) 410
Tewkesbury Union *v.* Birmingham Union 395
Thompson *v.* Eccles Corporation 1
Tinwell *v.* Mayhook 790
Tower Justices *v.* Chambers (C. A.) 903
Traae and Lennard & Sons, Ld., In re (C. A.) 377
Twamley, Wilson *v.* (C. A.) 99

U.

Underground Electric Railways Company of London *v.* Inland Revenue Commissioners 198

W.

Walder, Norman & Burt *v.* (C. A.) 27
Walkers, Winser & Hamm and Shaw, Son & Co., In re 152

		PAGE
Watson (William) & Co., In re. Ex parte Atkin Brothers	(C. A.)	753
Weardale and Consett Water Company *v.* Chester-le-Street Co-operative Society		240
Wells *v.* Allott	(C. A.)	842
West Coast Gold Fields, Ld., Ex parte. In re Rowe		489
West Ham Union *v.* Holbeach Union	(C. A.)	121
Westminster Corporation *v.* Fuller	(C. A.)	737
——— *v.* Johnson	(C. A.)	737
———, Livingstone *v.*		109
Wicks, Gwendolen Freehold Land Company *v.*		622
Willesden Overseers, Hagmaier *v.*		316
Williams *v.* North's Navigation Collieries (1889), Ld.	(C. A.)	44
Wilson *v.* Twamley	(C. A.)	99
Wimbledon Urban Council, Jackson *v.*		359
Wormald & Walker, Ld., Gibson *v.*	(C. A.)	40

Y.

Yeoman *v.* Rex	(C. A.)	429
Young, Bolland *v.*	(C. A.)	824

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1904.

THOMPSON *v.* ECCLES CORPORATION.

1904
March 29.

Local Government—Drain or Sewer—Pipe draining several Houses belonging to different Owners—"Single private Drain"—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 4, 41—*Public Health Acts Amendment Act*, 1890 (53 *&* 54 *Vict. c.* 59), *s.* 19.

Where two or more houses are drained by a single pipe, neither the fact that the pipe is wholly situate on private land, nor the fact that the houses belong to different owners, will suffice to make the pipe a "single private drain" within the meaning of s. 19 of the Public Health Acts Amendment Act, 1890, so as to entitle the local authority, in the event of the pipe becoming a nuisance, to require the owner or occupier of the premises to amend it under s. 41 of the Public Health Act, 1875.

Semble, the words "belonging to different owners" in s. 19 of the Act of 1890 mean "not all belonging to the same owner." In order to bring a case within the section it is not necessary that all the houses should belong to different owners.

CASE stated by justices for the borough of Eccles.

A complaint was preferred by the respondents as the sanitary authority for the borough of Eccles against the appellant Thomas Thompson, under s. 41 of the Public Health Act,

1904

THOMPSON v. ECCLES CORPORATION.

1875, and s. 19 of the Public Health Acts Amendment Act, 1890, charging that he had made default in complying with the requisitions of a nuisance notice dated March 16, 1903, requiring him to abate a nuisance on certain premises situate at 428, Liverpool Road, in the said borough.

At the hearing of the complaint the following facts were proved:—

The appellant was the owner of a block of seven houses numbered 426 to 438, Liverpool Road, of which the house the subject of the complaint was one. The said houses were built in the year 1875 in accordance with plans deposited with the then sanitary authority, the predecessors of the respondents, and approved by them.

On March 6, 1903, complaint was made to the respondents that a certain drain or sewer belonging to 428, Liverpool Road was a nuisance and injurious to health. On examination the said drain or sewer was found to be in bad condition and to require alteration or amendment, and the respondents thereupon served upon the appellant the notice dated March 16 requiring him within fourteen days from the service thereof to take up the existing yard and cellar drains and gullies and tops, and in lieu thereof provide and lay down efficient drains constructed of glazed and socketed stoneware pipes, the joints to be properly made good with cement, the cellar drain to be embedded in concrete to a thickness of six inches all around the pipes, and to provide efficient wash-out gullies with lipped tops. The works therein specified were necessary for the purpose of abating the nuisance. The notice was not complied with. The said drain or sewer was part of a nine-inch pipe running through and under the cellars of the said seven houses belonging to the appellant, and receiving the drainage of each house before falling into the respondents' main sewer in Hampton Street—a street running at right angles to Liverpool Road. This nine-inch pipe was a continuation of, and received the drainage from, a six-inch pipe which passed through and under two blocks of six houses each, numbered respectively 424 to 414, Liverpool Road, and 412 to 402, Liverpool Road, and situate further away from Hampton Street than the

appellant's houses, and belonging to one Edward Johnson. The six-inch pipe received the drainage from each of the twelve houses before reaching the nine-inch pipe. These two blocks of houses belonging to Edward Johnson were separated from the appellant's block and from each other by private passages, and the whole of the said six-inch and nine-inch drain or sewer was laid through private property until it reached the public sewer in Hampton Street. It was admitted by the respondents that the notice required the appellant to make structural alterations in the drain or sewer.

On the part of the appellant it was contended that, as the drain of the house No. 428 received the drainage of more than one building not within the same curtilage belonging to the same owner, it became a sewer under the provisions of ss. 4, 13 of the Public Health Act, 1875, and was consequently vested in the local authority, and it was the duty of the local authority to keep it so as not to be a nuisance. It was also further contended on the part of the appellant that s. 41 of the Act of 1875 did not empower the respondents to order structural alterations, and that the notice of March 16, 1903, was therefore ultra vires and bad.

The justices found that the pipe in question was used by two or more houses belonging to different owners, and was a single private drain within the meaning of s. 19 of the Act of 1890 (1),

(1) By the Public Health Act, 1875, s. 4, "'Drain' means any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed:

"'Sewer' includes sewers and drains of every description except drains to which the word 'drain' interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act."

By the Public Health Acts Amendment Act, 1890, s. 19, sub-s. (1), "Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under section forty-one of the Public Health Act, 1875 (relating to complaints as to nuisances from drains), &c."

Sub-s. (3): "For the purposes of this section the expression 'drain' includes a drain used for the drainage of more than one building."

1904

THOMPSON v. ECCLES CORPORATION.

and made an order upon the appellant to abate the nuisance and to do any works necessary for that purpose.

G. Rhodes, for the appellant. The case does not fall within s. 19 of the Act of 1890, for that section only applies where the houses drained by the pipe all belong to different owners. Here twelve houses belonged to one owner and seven to another. This fact distinguishes the case from *Bradford* v. *Eastbourne Corporation* (1), where each of the six houses drained by the offending pipe belonged to a different person. But even assuming that s. 19 applies to this case, the order of the justices was bad in that it required the appellant to make structural alterations for the purpose of abating the nuisance. The judgment of Kennedy J. in *Vestry of Fulham* v. *Solomon* (2) is an authority that the words "require alteration and amendment" in the section of the Public Health London Act, 1891, corresponding with s. 41 of the Public Health Act, 1875, do not refer to structural alteration.

Fleetwood Pritchard, for the respondents. Upon the second point the case of *Southwold Corporation* v. *Crowdy* (3) is a direct authority to shew that where the condition of the drain is such as to cause a nuisance the local authority may require a structural alteration if necessary to abate the nuisance. It is there pointed out that Kennedy J. in *Vestry of Fulham* v. *Solomon* (2) was dealing with the right to require in the absence of any nuisance the amendment of a structure merely because it is made on defective principles. With regard to the first point, s. 19 of the Act of 1890 applies to the facts of this case. Here the pipe at the time it reached No. 428 had already received the drainage of Johnson's twelve houses, and also of No. 426 belonging to the appellant. Therefore, at that point there were a number of houses "belonging to different owners," in the sense of not all belonging to the same owner, drained by a single drain. And that single drain was a "private drain" within the meaning of the section. A private drain means one which is wholly made on private land, and to which consequently the public have no access.

(1) [1896] 2 Q. B. 205. (2) [1896] 1 Q. B. 198.
(3) (1903) 67 J. P. 278.

[CHANNELL J. The real solution of s. 19 probably is that the draftsman of the Act did not understand the law, and thought that so long as a drain-pipe which drained a number of houses was situate on private property, and the houses belonged to the same owner, the pipe was a private drain and not a sewer; but that, unfortunately, is a solution which we are not allowed to adopt.]

The case of *Bradford* v. *Eastbourne Corporation* (1) is on all-fours with the present case, and is in the respondents' favour.

Rhodes, in reply.

LORD ALVERSTONE C.J. Speaking for myself, I may say that I hope that the Court of Appeal or the House of Lords may be able, by sweeping away some of the conflicting decisions upon this subject, to reduce the law to a logical system, or else that the Act of 1890 may be amended by the insertion of a definition of the expression "single private drain."

I cannot help feeling that it is unfortunate that the Legislature should ever have allowed it to become law that a person may convert that which would otherwise be a private drain into a sewer, and impose upon the local authority the obligation of repairing it, simply by allowing other persons to send the drainage of their houses through it. But the language of the definition clause in the Act of 1875 is plain, and it cannot now be disputed that under that Act a drain-pipe which receives the drainage of more than one building is a sewer none the less because it is made entirely through private property. Therefore, apart from the Act of 1890, the conduit in the present case, which was constructed before 1890, was a sewer. The Act of 1890 provides by s. 19 that "Where two or more houses belonging to different owners are connected with a public sewer by a single private drain" the procedure under s. 41 of the Act of 1875 may be put in force. And the question is what is meant by a "single private drain." It is said that the cases of *Bradford* v. *Eastbourne Corporation* (1) and *Self* v. *Hove Commissioners* (2) have decided that, where a pipe running through private land receives

(1) [1896] 2 Q. B. 205. (2) [1895] 1 Q. B. 685.

1904

THOMPSON v. ECCLES CORPORATION.

Lord Alverstone C.J.

the drainage of several houses, the effect of s. 19 of the Act of 1890 is to convert the pipe into a private drain if the houses belong to different owners, although it would have left it a sewer if the houses had all belonged to one person. That conclusion seems to me absurd and ridiculous, and one which the Court should be at pains to avoid if by any possibility it can be avoided. It is true that the facts in the *Eastbourne Case* (1) are almost identical with those in the present, and in that case the Court seem to have thought that the fact of the pipe being situate wholly on private land was sufficient to make it a private drain for the purposes of s. 19, though it might be a sewer for other purposes. And if that case stood alone we might be compelled to follow it. But we have to choose between conflicting decisions. Whatever the Legislature may have meant by s. 19, I am at all events satisfied of this, that they did not intend the test of whether a pipe on private land was a private drain or not to depend upon the question of the houses which it drained belonging to one owner or to more. It may be that, as my brother Channell has suggested, the framers of the Act of 1890 were under the impression that a pipe on private land which drained several houses belonging to the same owner was a private drain under the Act of 1875, and being under that impression desired to place a pipe which drained several houses belonging to different owners on the same footing. But we are not permitted to adopt that explanation, and under those circumstances we are driven to the conclusion that s. 19 must have been designed to meet the rare case of a drain-pipe made for the purpose of draining several houses for the profit of the person constructing it, which under s. 13 of the Act of 1875 does not vest in the local authority, and consequently remains a private drain. I am of opinion that in this case the pipe which received the drainage of No. 428, Liverpool Road was a sewer and not a single private drain, and that s. 19 of the Act of 1890 has no application. And on that ground the appeal must be allowed. With regard to the other ground of the appeal, I think the case of *Southwold Corporation* v. *Crowdy* (2) is conclusive against the

(1) [1896] 2 Q. B. 205.

(2) 67 J. P. 278.

appellant. That case decided that s. 41 of the Act of 1875 applies to all cases in which the bad condition of the drain is such as to amount to a nuisance even though the alteration or amendment necessary to abate the nuisance may involve an alteration of the structure.

DARLING J. I find myself unable to arrive at anything that could be reasonably called an opinion with respect to the meaning of s. 19 of the Act of 1890. It seems to me that the simplest way out of the difficulty is for Parliament to recognise that a mistake has been made in the legislation, and by amending the section to get rid of the absurdities that necessarily result from the manner in which it has been framed, and put the matter on an intelligible basis. With respect to our decision in this particular case, I content myself with saying that if any one can reconcile these Acts of Parliament it is my brother Channell, and whatever his view upon this section may be, to that view I am ready to subscribe.

CHANNELL J. I should be glad if this case went before a higher tribunal, so that if possible an authoritative decision upon this subject might be obtained, though at the same time I do not think that a thoroughly satisfactory decision is possible. The problem is how to reconcile the provisions of s. 19 of the Act of 1890 with the general definition clause in the Act of 1875, and that is a problem which in my opinion is really insoluble.

There is one point upon that section made by the appellant as to the meaning of the words "belonging to different owners" which I may get rid of at once. I am perfectly clear that the proper interpretation of those words is "not all belonging to the same owner." It could not have been intended that, if there were a row of twenty houses, different considerations were to apply according as they belonged to twenty different owners, or only to nineteen owners by reason of two houses in the row belonging to the same person. Whatever the object of the Legislature was in enacting this section, it is intelligible that they should say with reference to that which is

1904

THOMPSON v. ECCLES CORPORATION.

Channell J.

a single private drain that the fact of the houses not all belonging to the same owner shall not prevent the making of an order under s. 41 of the Act of 1875. But why did they limit the application of s. 19 to the case of a pipe draining houses not all belonging to the same owner? What did they mean by a single private drain? The most natural answer to that question is that which I suggested in the course of argument, namely, that the person who framed the section was labouring under the idea that a pipe might be a single private drain under the Act of 1875, although it drained different houses, provided they all belonged to the same owner. That is certainly not the general law, although there are certain exceptional cases in which it may happen. There is another possible solution of the problem as to how this s. 19 came to be passed, which is this. The Act of 1890 is an adoptive Act, and a considerable number of the clauses in it are clauses which had been passed from time to time in various local Acts, and s. 19 is one of such clauses; for instance, it appears in s. 134 of the Carlisle Corporation Act, 1887 (50 & 51 Vict. c. xix.), which was one of the Acts discussed in *Hill* v. *Hair*. (1) But then those local Acts did not always contain a definition of the term "drain" similar to that in s. 4 of the Act of 1875 (2), while some of them contained clauses similar to s. 250 of the Metropolis Local Management Act, 1855, whereby the expression "drain" is made to include any drain for draining a block of houses by a combined operation under the order of the local authority. Under those circumstances the sections of the local Acts corresponding to s. 19 of the Act of 1890 were perfectly easy to construe; there was no difficulty about them. But when those sections got imported into the Act of 1890, in which the term "drain" was to be interpreted as defined by s. 4 of the Act of 1875, a difficulty at once arose. Personally I do not think a perfectly

(1) [1895] 1 Q. B. 906.

(2) The Carlisle Corporation Act, 1887, did not contain any definition of either "drain" or "sewer"; and though by s. 4 of that Act "Terms and expressions to which meanings are assigned in the Public Health Acts, or which have therein special meanings," are to "have in this Act the same respective meanings," they are only to do so "unless there be something in the subject or context repugnant to such construction."

satisfactory solution of that difficulty is possible; but one must offer the best one can, and it seems to me that the best available is that suggested by Cave J. in *Hill* v. *Hair* (1) that there may be in law such a thing as a single private drain draining more than one house, for instance, where it drains two houses within the same curtilage, or where it drains a number of houses for the profit of the maker of the drain, or where a local Act so provides, or possibly where there is an agreement between a local authority and a building owner that they will sanction a combined system of drainage upon the terms of the pipe remaining a private drain. If s. 19 be understood as limited to those cases, then you can give it a sensible interpretation—otherwise not. If you can shew in a particular case that a drain is a private drain of one of those descriptions, then you may make an application under s. 41, although the houses drained by it belong to different owners. But the fact that the houses belong to different owners will not make it a private drain. In the present case the pipe does not belong to one of the exceptional classes that I have indicated, and consequently the general rule applies, and, as it drains more than one house, it is a sewer and not a private drain, and consequently s. 19 has no application. The appeal must be allowed.

Judgment for the appellant.

Solicitor for appellant: *E. Lorimer Wilson, Manchester.*

Solicitors for respondents: *Sharpe, Parker & Co., for W. H. Hickson, Eccles.*

(1) [1895] 1 Q. B. 906.

J. F. C.

C. A.

1904

March 23, 24, 25.

[IN THE COURT OF APPEAL.]

HAMBRO *v.* BURNAND AND OTHERS.

Principal and Agent—Authority of Agent—Contract made by Agent in Name of Principal, but in his own Interests—Liability of Principal.

Where an agent, in contracting on behalf of his principal, has acted within the terms of a written authority given to him by the principal, but the existence of which was not known to the other party to the contract, the principal cannot, if the other party has acted bonâ fide, repudiate liability on the contract on the ground that the agent, in making it, acted in his own interests, and not in those of his principal.

APPEAL by the defendants other than Burnand from the judgment of Bigham J. in an action tried by him without a jury. (1)

The action was brought against five defendants upon a guarantee policy in the following terms: "To Messrs. C. J. Hambro & Son. In consideration of your accepting at our request the drafts of Henry Gaze & Sons (hereinafter called the drawers) to such an amount as you may think proper, such drafts to be drawn and accepted within one year from October 1, 1902, and in consideration of the premium of 1 per cent. paid to us by the drawers on the execution hereof (the receipt whereof we hereby acknowledge), we, the underwriters, agree that, if the drawers do not at or before maturity of any such drafts put you in funds to meet the same, we will within thirty days of receipt of notice from you of such default on the part of the drawers pay to you in cash the amount of such drafts, and will further indemnify and hold you harmless against all moneys, loss, costs, charges and expenses which you may have to pay or to which you may be put by reason of your having accepted such drafts, or by reason of any claims made by any company or person in respect of the transactions above mentioned, provided that our liability hereunder shall not exceed the amount of our respective subscriptions hereto

(1) [1903] 2 K. B. 399.

with interest thereon at the rate of 5 per cent. per annum from the time of payment being demanded."

The policy was subscribed with the names of the five defendants, the names being all subscribed in the handwriting of Burnand. On October 9, 1902, the plaintiffs accepted a draft of Henry Gaze & Sons, Limited, at ninety days' sight, for 1000*l.* The bill fell due on January 10, 1903, and Henry Gaze & Sons made default in finding money to meet it. Thereupon the plaintiffs claimed under the policy sued on to be paid by each of the five defendants his proportion, namely, 200*l.* of the amount.

The facts of the case, and the circumstances under which the policy sued upon was executed, are very fully set out in the judgment of Bigham J. in the Court below (1), to which the reader is referred. The following summary of the facts as found by the learned judge will, it is thought, be sufficient for the purposes of this report. Each of the defendants other than Burnand had given to the latter, who was a member of Lloyd's, an authority in writing, which, in substance, authorized Burnand to act as his agent for the purpose of underwriting policies of insurance, and carrying on the ordinary business of an underwriter, at Lloyd's, in his name and behalf, in accordance with the usual custom at Lloyd's. The written authorities so given to Burnand by the other defendants were never shewn, nor was their existence known, to the plaintiffs.

At the end of the year 1899 an arrangement was made between a company, called Henry Gaze & Sons, Limited, and the plaintiffs, under which the company was financed by the plaintiffs, who were bankers, in the following manner. The plaintiffs accepted the drafts of Henry Gaze & Sons, Limited, which the latter got discounted, and they, by way of security, obtained and delivered to the plaintiffs guarantee policies similar to that above mentioned. Some of these policies were underwritten by Burnand in the names of himself and his co-defendants, and by other underwriters, and others by other underwriters. In November, 1900, the amount afloat of the drafts so accepted by the plaintiffs had reached 14,500*l.* After

(1) [1903] 2 K. B. 399.

C. A. 1904

HAMBRO v. BURNAND.

that date various sums were paid by Henry Gaze & Sons in reduction of the amount of their obligations to the plaintiffs, so that at the end of 1901 the bills afloat only amounted to 7500*l*. These bills were renewed from time to time during the year 1902, fresh policies being given to the plaintiffs to secure the amounts of the bills so renewed, the last of which was the policy upon which the action was brought. The later policies given to secure the renewed bills were only signed by Burnand in his name and the names of the other defendants, the other underwriters, whose names had appeared on the policies given in 1900, no longer being parties. Burnand became in August, 1900, a director of Henry Gaze & Sons, Limited, and was personally engaged in financial dealings with that company. Before the end of 1900, the plaintiffs became aware of the fact that he was a director of the company, but they knew no more than that fact would convey to them. It appeared that no premiums had ever been paid by Henry Gaze & Sons on these policies. Burnand never entered them in his business books, or introduced them into any of the accounts which he rendered to the other defendants, and he had intercepted letters addressed to them for the purpose of preventing them from becoming aware of the existence of these policies. Bigham J. was of opinion upon the evidence that Henry Gaze & Sons, Limited, was not solvent when the first advances were obtained from the plaintiffs, and that its financial position afterwards became rapidly worse; and that Burnand, knowing what its position was, and desiring to keep it afloat, was, in underwriting the guarantee policies before mentioned (including that sued upon), acting for himself and in furtherance of his own interests, and not for or in the interest of the other defendants. He found upon the evidence as a fact that it was in the ordinary course of an underwriter's business at Lloyd's to underwrite such policies; but that, under the circumstances before mentioned, the defendant Burnand could not be considered to have signed the policy sued upon on behalf of, or within the scope of the authority given by, the other defendants; and he therefore gave judgment for the plaintiffs against Burnand only, and for the other four defendants. The plaintiffs appealed, and the

defendants other than Burnand gave notice of contention by way of cross-appeal against the finding of the learned judge that the underwriting of such a policy as that sued on was in the ordinary course of the business of an underwriter at Lloyd's.

Asquith, K.C., and *Scrutton*, K.C. (*Mackinnon* with them), for the plaintiffs. The evidence abundantly justified the learned judge in finding as a fact that the underwriting of guarantee policies, like that sued on, was in the ordinary course of the business of an underwriter at Lloyd's. That being so, the defendant Burnand, in underwriting this policy in the names of his co-defendants, was acting within the express terms of the authority given to him. The learned judge treated it as open to the defendants other than Burnand to set up that, though the policy was signed with their names as principals, and was within the terms of the authority given to him, it was really made by Burnand for himself alone and for his own purposes. The case of *Keighley, Maxsted & Co.* v. *Durant* (1) shews that this contention is inadmissible. In that case a person, who was alleged to have intended to contract on behalf of a third party, but without his authority, made a contract, not professing to act on behalf of a principal, and it was held that it was not competent for the third party to ratify the contract, because the intention of the agent could not be inquired into for the purpose of altering the contract as made. On the same principle, the agent here having professed to contract for principals, and having been in fact authorized by them so to contract, the state of his mind cannot be inquired into, in order to shew that he was not really exercising his authority, and did not so contract. Moreover, it is impossible to say that the defendant Burnand did not intend to contract on behalf of his principals, for it is obvious that he did intend to contract for them as well as himself, and he was authorized to do so. It cannot be contended that he contracted for himself only, or that he was not authorized to make the contract, because, in doing so, he regarded his own interests, and not the interests of his

(1) [1901] A. C. 240.

C. A. 1904

HAMBRO v. BURNAND.

principals, and his conduct, as between himself and them, was a breach of his duty as agent. The plaintiffs cannot stand in a worse position than if they had asked to see, and had been shewn, the written authorities under which Burnand acted. On their being shewn those authorities, and finding that they authorized him to underwrite the policy, it could not be incumbent upon them to institute an inquiry for the purpose of ascertaining whether he was acting bonâ fide in the interests of his principals, or was actuated by any indirect motives. Business could not be carried on upon such terms. Bigham J. was impressed with the judgment of Nelson C.J., the dissentient judge, in the American case, *North River Bank* v. *Aymar* (1); but the point has since been dealt with in other American cases, which were not brought to his attention, and has now been settled adversely to the view taken by Nelson C.J., and in favour of that expressed by the majority in the former case: see *Exchange Bank* v. *Monteath* (2); *New York and Newhaven Railroad Co.* v. *Schuyler* (3); *President, &c., of Westfield Bank* v. *Cornen.* (4) A passage in the judgment of Lord Brougham in *Bank of Bengal* v. *Fagan* (5) is most strongly against the contention of the defendants; and in the case of *Bryant, Powis & Bryant* v. *Quebec Bank* (6) Lord Macnaghten, in delivering the judgment of the Judicial Committee of the Privy Council, adopts the view taken by the American Court in *President, &c., of the Westfield Bank* v. *Cornen.* (4)

[They also cited *Montaignac* v. *Shitta* (7); *In re Tiedemann and Ledermann Frères* (8); Story on Agency, 9th ed. s. 73, p. 91; *Summers* v. *Solomon.* (9)]

Montague Lush, K.C., and *A. J. Ashton* (*Isaacs, K.C.*, and *Maurice Hill*, with them), for the defendants other than Burnand. They argued, first, that, upon the evidence, the finding of the learned judge that the underwriting of guarantee policies was

(1) (1842) 3 Hill, 262.
(2) (1863) 26 N. Y. (12 Smith) 505.
(3) (1865) 34 N. Y. (7 Tiff.) 30.
(4) (1867) 37 N. Y. (10 Tiff.) 320.
(5) (1849) 7 Moo. P. C. 61, at p. 74.
(6) [1893] A. C. 170, at p. 180.
(7) (1890) 15 App. Cas. 357.
(8) [1899] 2 Q. B. 66.
(9) (1857) 7 E. & B. 879.

in the ordinary course of the business of an underwriter at Lloyd's was wrong.

Secondly, it is submitted that the view of the law taken by Bigham J. was right. It is most material in the first place to observe that there was no evidence in this case of any holding out of Burnand by his co-defendants as their agent to sign such policies. It was not suggested on the part of the plaintiffs that there had been anything in the nature of such a holding out, so as to create an estoppel against the co-defendants of Burnand. The written authorities were never shewn or communicated to the plaintiffs. They really have nothing to do with the case further than as shewing what authority Burnand would have had if he had really acted for his principals. They did not influence the plaintiffs in any way; and the case stands on the same footing as any other case in which a person contracts with another on the representation necessarily implied by his professing to act on behalf of a principal, and takes the risk whether that representation is true or not. In the absence of anything in the nature of an estoppel against the defendants by holding out Burnand as their agent, it is submitted that, if Burnand could not be said to be acting in the exercise of the authority given to him as between himself and his principals, the plaintiffs cannot stand in a better position than Burnand. As between himself and his principals, Burnand, in underwriting the policy, was not acting in pursuance of his authority, but solely in his own interests, and for his own purposes. namely, for the purpose of upholding Gaze & Sons, Limited, which he was personally interested in keeping afloat. The object of the mandates given to him was that he might invest his principals' money in the business of insurance so as on a balance of risks to make a profit for his principals. That was not the object with which Burnand underwrote these policies. He incurred liabilities on behalf of each of his co-defendants to an amount exceeding 20,000*l.* on one risk, namely, the solvency of Gaze & Sons. No premiums ever appear to have been paid upon these policies by Gaze & Sons. The policies were never entered in Burnand's books, and he never introduced them into any accounts rendered to the other defendants. He intercepted letters addressed to them in order

C. A. 1904

HAMBRO v. BURNAND.

to keep from them any knowledge of these policies. It surely cannot be said that such a course of action comes within an authority to deal in the ordinary course of business at Lloyd's. It may be that, if there had been evidence that Burnand had been held out as having authority to underwrite these policies by his co-defendants, then they would have been liable, notwithstanding the fact that, as between him and his principals, his conduct was a breach of his duty as an agent. But, where the case is simply one in which a person contracts with another who professes to act for a principal, which is all that this case amounts to, it is submitted that the authorities shew that the question is whether the supposed agent was in truth acting within the scope of his authority. If he was not, though he professed to be so acting, the person contracting with him, who has, in so contracting, trusted to his representation, and has not acted on the faith of anything done by the principal, takes the risk, and must bear the loss upon its turning out that the agent was not in truth acting within the scope of his authority. The cases of *Bank of Bengal* v. *Fagan* (1) and *Bryant, Powis & Bryant* v. *Quebec Bank* (2) appear to have related to negotiable instruments, and to have turned upon the doctrine of the law merchant with regard to the position of a bonâ fide holder for value of such an instrument.

[ROMER L.J. The decision in *Bryant, Powis & Bryant* v. *Quebec Bank* (2) could hardly have depended upon that doctrine, for the indorsements appear to have been per pro, which would have been notice to the holder that they were made under a special authority.]

[They also cited *Grant* v. *Norway* (3); *George Whitechurch, Ld.* v. *Cavanagh* (4); *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (5); *Houldsworth* v. *City of Glasgow Bank* (6); *Coleman* v. *Riches* (7); *Barwick* v. *English Joint Stock Bank* (8); *Salomons* v. *Pender* (9); Story on Agency, 9th ed. s. 133, p. 149.]

(1) 7 Moo. P. C. 61.
(2) [1893] A. C. 170.
(3) (1851) 10 C. B. 665.
(4) [1902] A. C. 117.
(5) (1887) 18 Q. B. D. 714.
(6) (1880) 5 App. Cas. 317.
(7) (1855) 16 C. B. 104.
(8) (1867) L. R. 2 Ex. 259.
(9) (1865) 3 H. & C. 639.

The circumstances were such as ought to have excited the suspicions of the plaintiffs, and put them on inquiry as to whether Burnand was acting bonâ fide in underwriting these policies in the names of the other defendants.

Scrutton, K.C., in reply.

COLLINS M.R. The question raised by this appeal is one of great importance; but, after the assistance which we have received from the arguments of counsel, and reference to authorities which were not before Bigham J., I entertain no doubt on the matter, and I do not think that anything would be gained by taking time to consider our judgment. The action is brought by the plaintiffs, who had arranged with Gaze & Sons, Limited, to accept drafts drawn by that company on condition that they should be secured by what have been called guarantee policies, upon a policy dated October 1, 1902, which was underwritten by the defendant Burnand in his own name and in the names of the four other defendants, who had respectively given him written authorities to underwrite risks on their behalf at Lloyd's in very wide terms. The policy sued upon is one of a series of similar policies given by Gaze & Sons to the plaintiffs. It is unnecessary to go through the whole series in detail. They were all connected together; certain policies had been originally given in respect of transactions in the year 1900, and the policies given subsequently to 1900 were by way of renewal of policies given in that year, the policy sued upon being the last of such renewals. Written authority had been given by each of the other defendants to Burnand to act as his agent for the purpose of underwriting policies, and of carrying on the business of an underwriter at Lloyd's. I will read the authority given by the defendant Read, as having been the most frequently referred to during the argument; but I do not think that there is any real distinction between that and the others. It is, leaving out immaterial portions, as follows. After reciting that Read is desirous of carrying on the business of an underwriter at Lloyd's in manner thereinafter mentioned, and of appointing Burnand to conduct such business on his behalf, and that he

C. A. 1904

HAMBRO v. BURNAND.

Collins M.R.

has paid a certain sum into a bank to be used for the purposes of the business, it provides that "the said Percy George Calvert Burnand shall act, for a period of three years certain, commencing as from August 19, 1891, and terminating on December 31, 1894, and thereafter from year to year, subject to six months' notice in writing by either party, such notice to terminate on December 31 in any year, as the agent of the said Robert Arthur Read, for the purpose of underwriting policies of insurance at Lloyd's, and carrying on the ordinary business of an underwriter at Lloyd's (hereinafter called 'the business') in the name, and on behalf of, the said Robert Arthur Read, in accordance with the usual custom of Lloyd's, and upon the terms and conditions hereinafter contained. The said Percy George Calvert Burnand shall during the said period have the sole management of the business, and all risks shall be taken, and all losses, averages, and returns shall be settled by him in the name and on account of the said Robert Arthur Read; and the risks to be taken, and the claims to be settled, shall be left to the discretion of the said Percy George Calvert Burnand, and the said Robert Arthur Read shall sign the necessary authority for that purpose to the bankers. The said account shall be devoted solely to the purposes of the business, but subject thereto and to the winding-up of the business at the termination of the agency, it shall belong to the said Robert Arthur Read absolutely." Then followed provisions as to keeping accounts of the business, the remuneration to be paid to Burnand, and other matters. There is no doubt that the indebtedness of Gaze & Sons to the plaintiffs, and the aggregate of the liabilities undertaken by Burnand on these policies became in process of time very large, and, ultimately, the amount secured by the policy of October 1, 1902, not being paid, this action was brought.

The defendants other than Burnand set up two defences.

They say first that they are not liable, because the authority given by them to the defendant Burnand was limited to the purpose of underwriting policies of insurance, and carrying on the ordinary business of an underwriter at Lloyd's, in accordance with the usual custom of Lloyd's, and the underwriting

of guarantee policies, such as that sued on, is not part of the ordinary business of an underwriter at Lloyd's. Whether that is so or not is a question of fact.

Secondly, they say that, as a matter of law, having regard to the inferences of fact drawn by Bigham J. as to the motives which led Burnand to underwrite the policy, and his relation to Gaze & Sons, that he undertook this liability on their behalf without their authority.

I will deal first with the question of fact. Bigham J., after hearing the evidence of the witnesses called before him, was of opinion that the weight of that evidence was strongly in favour of the view that this class of business, namely, underwriting guarantee policies, was part of the ordinary business of an underwriter at Lloyd's. It had to be admitted on the part of the defendants that the underwriting of what are called "solvency policies" formed part of that business. The only distinction between those policies and the so-called guarantee policies is that in the one case the underwriter undertakes to pay in the event of the insolvency of a debtor, and in the other he undertakes to pay in the event of non-payment by the debtor. The question is one of fact, and the learned judge acted on what appeared to him a clear preponderance of evidence to the effect that there was no distinction for this purpose between the two kinds of policy, or, even if there was, that it was part of the ordinary business of an underwriter at Lloyd's to underwrite guarantee policies. It appears to me that there was abundant evidence to justify the learned judge, exercising the functions of a juryman, in coming to the conclusion of fact at which he arrived.

I now come to the question of law which has been discussed before us. It has been contended for the appellants that, although express authority was given in writing, as in the present case, authorizing an agent to make such a contract as he has made, it is open to the principal to say that, nevertheless, if it appears, on inquiring into the motives which existed in the agent's mind, that he intended, in making the contract, to misuse for his own ends the opportunity given to him by his authority, and apply it to a purpose, which, if the

C. A. 1904

HAMBRO v. BURNAND.

Collins M.R.

principal had known of it, he would not have sanctioned, then, because the agent was so influenced by improper motives, the principal is not liable upon the contract made by him. I should have said myself, apart from authority on the subject, that such a proposition could not hold water. I am somewhat surprised to find that, in an American case, a view favourable to it has been taken by one of the judges. I gather that it was in consequence of what was said in that case that Bigham J., for whose opinion on a commercial point I have the greatest respect, was led to the conclusion which he adopted. The case of *North River Bank* v. *Aymar* (1) was cited to him, in which there was a difference of opinion between the judges, one of them adopting the view that, though an agent had acted within the terms of his authority, it was competent to the Court to look into the mind of the agent, and, if he had misapplied his authority for his own purposes, the principal was not bound. The other two judges did not agree with that view. Bigham J., after examining the reasons given in that case, came to the conclusion that the reasoning of the dissentient judge was the stronger; and, not being fully apprised of the present state of the American authorities, he decided on similar grounds that the principals in the case before him were not liable for the act of the agent. But since that case the question has been mooted several times in America, and ultimately the American Courts have authoritatively laid it down as the true principle that, where a written authority given to an agent covers the thing done by him on behalf of his principal, no inquiry is admissible into the motives upon which the agent acted. It would be impossible, as it seems to me, for the business of a mercantile community to be carried on, if a person dealing with an agent was bound to go behind the authority of the agent in each case, and inquire whether his motives did or did not involve the application of the authority for his own private purposes. The matter however does not rest there, for the view which has been ultimately established in the United States by a strong concatenation of American authorities

(1) 3 Hill, 262.

appears to have been anticipated in England, and at length finally adopted in a recent decision of the Judicial Committee of the Privy Council. There is a very remarkable passage in the judgment delivered by Lord Brougham in the year 1849 in the case of *Bank of Bengal* v. *Fagan*. (1) He said: "But it is said that the power was given to do the acts in question on the donor's behalf. This is really only saying that, what the agent is to do, he is to do as representing the principal; as doing it on behalf of, or in the place and in the right of, the principal. But it is further said that, even if the expression be read as only amounting to this, the indorsement is to be only made for the benefit of the principal, and not for the purposes of the agent. We do not see how this very materially affects the case, for it only refers to the use to be made of the funds obtained from the indorsement, not to the power; it relates to the purpose of the execution, not to the limits of the power itself; and, though the indorsee's title must depend upon the authority of the indorser, it cannot be made to depend upon the purposes for which the indorser performs his act under the power." That passage seems by anticipation to deal with the very point which was the salient point of the judgment of Bigham J. in this case and of the argument before us. In the case of *Bryant, Powis & Bryant, Ld.* v. *Quebec Bank* (2) Lord Macnaghten, in delivering the judgment of the Judicial Committee of the Privy Council, says: "The law appears to their Lordships to be very well stated in the Court of Appeal in the State of New York in *President, &c., of the Westfield Bank* v. *Cornen* (3), cited by Andrews J. in his judgment in another case brought by the Quebec Bank against the company. The passage referred to is as follows: 'Whenever the very act of the agent is authorized by the terms of the power, that is whenever, by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent, as to all persons dealing in good faith with the agent; such persons are not bound to inquire into facts

(1) 7 Moo. P. C. 61, at p. 74. (2) [1893] A. C. 170.
(3) 37 N. Y. (10 Tiff.) 320.

C. A. 1904

HAMBRO v. BURNAND.

Collins M.R.

aliunde. The apparent authority is the real authority.'" That passage, as pointed out by the plaintiffs' counsel, though acted on and adopted by the Court of Appeal of New York, was taken from the language of the majority of the judges in the first-mentioned American case. So that, after a series of cases, that is the final view of the Courts in America, which has been adopted by the Judicial Committee of the Privy Council. The defendants' counsel sought to distinguish the case of *Bryant, Powis & Bryant, Ld.* v. *Quebec Bank* (1) on the ground that it related to a negotiable instrument in the hands of a bonâ fide holder for valuable consideration. But, as Romer L.J. has pointed out, it appears that the agent who indorsed the bills in that case indorsed them "per pro," thereby giving notice to any one who took the bill of the fact that he was acting within the terms of a special authority. It is not ad rem, therefore, to say that the case concerned a negotiable instrument; the rights of the person who took the bill under such circumstances had to be measured by the authority given to the agent. It seems to me that the law on the subject is clearly established, and therefore the ground of the judgment of Bigham J. fails. That being so, it is really unnecessary for me to go into the various matters relied upon by the defendants in relation to the question whether, in underwriting the policy, Burnand was acting for his own benefit, and in his own interests, and not in those of the other defendants. On the view which I have taken the plaintiffs were not concerned to inquire into those matters, and they do not affect their right to recover upon the contract which was made by the defendant Burnand with the authority of the other defendants. On these grounds I think the appeal must be allowed.

ROMER L.J. I am of the same opinion. With regard to the first question arising in this appeal, which is one of fact, I have come to the same conclusion as Bigham J. The written agreements, which conferred authority on the defendant Burnand to underwrite policies on behalf of his co-defendants, were entered into by men of business, who must be presumed

(1) [1893] A. C. 170.

to have known the practice and course of business at Lloyd's, and must be construed accordingly; and, having regard to the evidence given as to the practice of underwriters at Lloyd's, without going through it in detail, I think it is enough to say that I am satisfied that, by the terms of the written authorities given by his co-defendants to Burnand, he was empowered to underwrite guarantee policies, such as that sued upon in this case, on their behalf.

There remains the question of law. I will first say a few words on that as a matter of principle. We have here an authority given to an agent to underwrite policies for his principals, expressly stating what powers are conferred upon him. If the agent, in underwriting a policy in the principal's name, acted within the scope of that written authority, it appears to me on principle that, as regards a person taking in good faith and for valuable consideration the policy so underwritten, it is binding on the principal, who cannot escape from liability merely because the agent may have abused the authority or betrayed his trust. Consider how the case would have stood if the plaintiffs in this case, who accepted the guarantee policies, had not relied merely on the representation which Burnand necessarily made to them by professing to sign the policies on behalf of his co-defendants. The utmost which, it appears to me, they need have done, as between themselves and the principals of the agent, was to ask the agent to produce his written authority, if he had any. Had they done that, and had that authority been shewn to them, it would have been hopeless, in my opinion, for the principals of the agent afterwards to say that they were not bound by the written authority so inspected because the agent had acted in bad faith towards them in acting upon that authority. As a matter of principle this appears to me so clear that I will not further consider the point. Then does it make any difference that in point of fact the plaintiffs did not inspect the authority? I think not, for this reason. By not inquiring for the written authority, they no doubt ran a certain risk. What was that risk? The agent represents that he has authority by reason of the fact that he signs the policy in the names of his co-insurers. If the plaintiffs

C. A. 1904

HAMBRO v. BURNAND.

Romer L.J.

do not ask to see his authority, upon what are they relying? They rely—and that is the only risk which they run—upon his representation that he has authority to enter into the contract. How can it be argued that the principals are not liable on the contract when it turns out that, to the extent to which the plaintiffs trusted the agent, they were justified in trusting him, and that, to the extent to which he made a representation of authority, he was justified in making such a representation? It seems to me that the plaintiffs are really in the same position as if they had asked to see the written authority, and it had been produced to them. It is said that the existence of the written authority not being known to the plaintiffs was immaterial, and that Burnand, having been capable in this case of fraud and misconduct towards his principals, would have been equally capable of representing that he had authority, even if he had not had it. Burnand has not been represented in this appeal; but, assuming for the present purpose that his conduct was such as suggested, I think that the argument is entirely fallacious. I should say that there are few things clearer than that a man, who might not shrink from such misconduct, would shrink from signing the names of others to instruments without authority, for the very good reason that doing so might involve great risk of making himself liable to criminal proceedings of an extremely serious character. It seems to me very unlikely that Burnand would have signed these policies in the name of his co-defendants unless he had had and relied upon the written authority given to him. I think, therefore, that on principle the point of law ought to be decided in favour of the plaintiffs.

As to the authorities, after what the Master of the Rolls has said, I wish to say a few words only. I think the cases cited for the defendants which concerned the relation of master and servant are not applicable to the present case. In those cases the sole question was as to the authority by implication conferred by a master upon a servant. They have nothing to do with a case where there is an express authority in writing. Further, I agree with the Master of the Rolls that the point has been decided in this country, if not before, by the case of

Bryant, Powis & Bryant v. *Quebec Bank* (1), to which we have been referred. Therefore both on principle and authority I think the point of law ought to be decided contrary to the view which Bigham J. took.

In conclusion I wish to say that, although, upon the terms of the written authority given, the signing of the policies by the defendant Burnand was within the scope of his authority as agent, yet, if the plaintiffs had taken them with notice of the fraud of the agent, they would not have been entitled to recover upon them against the persons defrauded. The defendants, however, appear to me to have altogether failed to establish any such case. All that could be said was that it was known to the plaintiffs that Burnand was a director of Gaze & Sons at the time when the policy sued upon was executed; but that knowledge did not, as it seems to me, per se affect them with notice that he occupied a position which rendered it impossible for him properly to act as an agent for his co-defendants in signing these policies. I cannot see any evidence in this case which shews anything in the nature of knowledge on the part of the plaintiffs, either direct or indirect, of any misconduct on the part of Burnand which ought to have put them on inquiry, or could absolve the co-defendants of Burnand from liability on the policy.

MATHEW L.J. I agree. The exhaustive judgments which have been already delivered relieve me of any necessity for doing more than briefly expressing the reasons why I concur in them. The first question is one of fact, namely, whether the policy sued upon was such as would in the ordinary course of business be effected with underwriters at Lloyd's. The learned judge has found that it was, and I think that the evidence as a whole pointed clearly to the conclusion at which he has arrived.

With regard to the point of law, it appears to me that it would be fatal to the transaction of mercantile business, if persons dealing with brokers or other agents were bound to inquire into the motives with which they seek to contract

(1) [1893] A. C. 170.

C. A. 1904

HAMBRO v. BURNAND.

Mathew L.J.

on behalf of their principals. In this case the defendant Burnand, who was an underwriter, had authority to act as agent for the other defendants at Lloyd's. The authority was in each case given to him by a written document. The persons dealing with him were not likely to inquire for those documents, but there they were, if called for; and I agree that the position is really the same as if the plaintiffs had asked to inspect the documents in order to see what the authority was, and had been allowed to do so. Could it in such case be suggested that, after inspecting the documents, the plaintiffs would then be bound to inquire into the motives which actuated the agent in acting upon them? How could such an inquiry, practically, be made? Any inquiry of that kind would be regarded by the agent as an affront. It seems to me unreasonable to suggest that it was incumbent on the plaintiffs, in dealing with Burnand, first to insist on seeing the document under which he was acting as agent, and then to enter into an investigation as to his relation to Gaze & Sons, and the absence of any indirect and dishonest motives on his part in making the contract. The defendants, who made Burnand their agent, would know that credit would be given to him without any such proceeding. There does not appear to be any authority to shew that such an inquiry is required of a person dealing with an agent. Bigham J. seems to have acted upon the case of *North River Bank* v. *Aymar* (1) in the United States. But the later American authorities have quite disposed of the suggestion that such a burden is cast upon a person dealing with an agent. It is enough for us to say that it appears to be well settled in English law that the liability of a principal on a contract entered into by his agent within the terms of his authority cannot be affected by the unknown motives by which the agent was actuated in making the contract. The passage from the judgment of Lord Brougham in *Bank of Bengal* v. *Fagan* (2), which has been cited, the passage from Story on Agency, 9th ed. s. 73, p. 91, and the case of *Bryant, Powis & Bryant, Ld.* v. *Quebec Bank* (3), in my

(1) 3 Hill, 262.

(2) 7 Moo. P. C. 61.

(3) [1893] A. C. 170.

opinion establish the law on the subject, and shew that no such doctrine as we are asked by the defendants' counsel to adopt is maintainable.

Appeal allowed.

Solicitors for plaintiffs: *Parker, Garrett, Holman & Howden.*
Solicitors for defendants other than Burnand: *Merriman, Pike & Merriman; R. A. Read, Jun.; Ward, Bowie & Co.; Church, Rendell & Co., for J. B. Clarke & Co., Birmingham.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1904 *April* 12.

NORMAN & BURT *v.* WALDER.

Employer and Workman—Compensation—Review of Weekly Payment—Average Weekly Earnings before Accident—Average Amount Workman able to Earn after Accident—Earnings in Independent Business—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), 1*st Schedule*, (2), (12).

The respondent, a workman, met with an accident, and was awarded a weekly payment as compensation under the Workmen's Compensation Act, 1897. Upon an application by his former employers to review the weekly payment, the county court judge refused to take into consideration the earnings of the respondent in a business that he had started after the accident. On appeal:—

Held, that the expression "the average amount which he is able to earn after the accident," in paragraph 2 of the First Schedule to the Act, is not restricted to earnings in the service of an employer, but includes earnings in an independent business.

APPEAL from a decision of the judge of the Hayward's Heath County Court, on an application to suspend or diminish a weekly payment under an award made under the Workmen's Compensation Act, 1897.

Walder, the respondent in this case, was at one time in the service of the appellants, Messrs. Norman & Burt, who were builders and contractors, and in the course of his employment he met with an accident whereby he injured his left hand. His average weekly earnings before the accident amounted to 37*s.*, and on an application for compensation under the Act he was awarded a weekly payment of 18*s.* 6*d.* After the

C. A. 1904

NORMAN & BURT v. WALDER.

accident he set up in business as a baker, in which he was assisted by his wife, son, and daughter. Subsequently an application was made by the appellants to the county court judge under Sched. I., paragraph 12, of the Act to review the award. Upon this application evidence was given as to the amount of the profits made by the respondent in his business, and the learned judge reserved his judgment, and subsequently gave judgment as follows: "This is an application asking me as arbitrator to suspend or reduce the compensation awarded to the respondent by the award. The ground of the application is that since the award was made the respondent's earnings have increased to such an extent that he is no longer entitled to any compensation. The earnings are not wage earnings nor anything in the nature of wage earnings, but the profits of a trade business carried on by the respondent. I reserved judgment to consider whether the earnings of a trade business can be treated as 'earnings' within the meaning of Sched. I., paragraph 2, of the Act. The word in the Act no doubt is 'earnings,' but I am clear that, according to the true construction of the schedule, wage-earning capacity alone is to be taken into account. I may mention here that the earnings of the business carried on by the respondent are obtained in a peculiar manner. The respondent carries on the business in question with the labour and assistance of his wife, who has the principal share in the work, his daughter, who serves in the shop, and his son, who goes out with the horse and cart. He himself goes out with the horse and cart and has a general control of the business. As head of the family he appropriates the labour and assistance of his wife, son, and daughter, and takes the whole of the profits and maintains them. He does not receive any wages, nor is he in the service of any employer. It would be difficult to say what proportion of the total earnings in the business ought to be attributed to the respondent's own labour. I have had some difficulty in arriving at the total earnings in the business, but I estimate them at 2*l.* a week. In the view I take of the case it is immaterial. It is to be observed that the compensation to the workman for personal injury is, in my opinion, clearly assessable with reference to

weekly wages or earnings earned before the injury and weekly earnings or wages earned after the injury, and, in my opinion, trade profits in a business are no more to be taken into account than income of real estate. It may well be that the work in respect of which wages were earned after the accident need not be ejusdem generis with the work in respect of which wages were earned before the accident, and there is authority in the Court of Appeal for that view, but, in my opinion, earnings in trade are not earnings within the meaning of Sched. I., paragraph 2, of the Act. The application fails and must be refused with costs."

The appellants appealed.

A. Powell, K.C., and *Addington Willis*, for the appellants. The First Schedule, paragraph 2, says that "in fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident." The amount that can be earned after the accident is not described as wages, and the expression "average amount which he is able to earn" is not confined to earnings in an employment under a master. The words are perfectly general, and will cover anything that the injured man can earn either in employment under a master or in an independent business. *Irons* v. *Davis & Timmins* (1) shews that the occupation before and after the accident need not be the same, but that the question is what is the earning capacity after the accident, and *Chandler* v. *Smith* (2) and *Pomphrey* v. *Southwark Press* (3) support this view. The county court judge was therefore wrong in treating the amount of the respondent's earnings in his business as immaterial upon this inquiry, and he should have determined the amount of those earnings after making all necessary allowances, and thus ascertained the difference indicated in the schedule. The case should be sent back to be determined on its merits.

Stuart J. Bevan, for the respondent. The only test applicable

(1) [1899] 2 Q. B. 330. (2) [1899] 2 Q. B. 506.
(3) [1901] 1 K. B. 86.

C. A. 1904

NORMAN & BURT v. WALDER.

in the case of a workman who has been injured is his wage-earning capacity. Under the First Schedule (1.), (*b*), where total or partial incapacity for work results from the injury, the payment is not to exceed 50 per cent. of the average weekly earnings, and those average weekly earnings are again referred to in the 2nd paragraph. The whole Act deals with wages, and the expression "the average amount which he is able to earn after the accident" must refer to earning wages as a workman. It does not appear that any other earnings have ever been taken into account in settling a weekly payment, and to do so would open up an inquiry far beyond the wage-earning capacity of the workman. In *Crossfield & Sons* v. *Tanian* (1) A. L. Smith L.J. points out that "clause 12 means that in cases where a weekly payment has been ordered, and the injured workman gets better in health and earns better wages, the employer may apply for a review; on the other hand, the man might get worse and might be able to earn less wages, and he might in such a case take proceedings for a review," shewing that in the view of the learned judge the only question upon a review was the wage-earning capacity of the man before and after the accident.

COLLINS M.R. This is an appeal by employers from a decision of the late judge of the Hayward's Heath County Court. The question raised is whether on an application to review an award, made under the Workmen's Compensation Act, 1897, the fact that the man in whose favour the award was made is making money by a business which he carries on ought or ought not to be taken into consideration. The learned judge came to the conclusion, upon the construction that he put on the Act, that the question whether the man was making money in a business was immaterial and should not be taken into consideration. The result would be that, however prosperous the injured man might become as a tradesman, there would be no ground for altering the award of compensation.

The question turns upon one or two paragraphs of the First Schedule to the Act. Paragraph 1 (*b*) deals with the case

(1) [1900] 2 Q. B. 629, at p. 631.

of total or partial incapacity for work resulting from an injury, and obviously is applicable to workmen who are earning wages. Then follows paragraph 2, which deals with the fixing of the amount of the weekly payment, and declares that regard is to be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident. In the present case the workman had been earning 37*s.* a week, and an award of half that amount was made. It now turns out that later on he started a small business, out of which he got a return which the judge estimated at 2*l.* a week, and in carrying on that business he was assisted by his wife, son, and daughter. The judge did not consider and does not give any information as to the profits of the business, for he held that, whether they were large or small, they had nothing to do with the case before him, because earnings in a trade were not the earnings mentioned in paragraph 2 of the schedule to the Act. He held that unless the employers could shew that the earnings of the workman after the accident were wages received from an employer, they could not be taken into consideration. In my view this is too narrow a construction to put upon the Act, and the words "the average amount which he is able to earn after the accident" do not exclude earnings other than those received from an employer. It seems to me that, looking at the object that the Legislature had in view, those words ought not to be limited to money earned in the employment of a master. What the Act was intended to adjust was compensation for loss of the workman's earning power. Not, it is true, complete compensation, for the amount is limited to 50 per cent. of the average earnings. When an award has been made, and either party desires to review it under paragraph 12 of the schedule, all the circumstances must be looked at, and the arbitrator will have to say how far the capacity of the man for earning money has been altered. If he is able to earn money, though not from a master, that fact ought not to be excluded from consideration. The appeal will, therefore, be allowed. The case must go back to the county court for consideration.

C. A. 1904

NORMAN & BURT v. WALDER.

ROMER L.J. I am of the same opinion. I think upon the evidence in the case it is clear that the respondent was earning something in his business. How much of his takings is attributable as earnings is a matter that must be referred back to the county court for consideration upon a view of the whole position of affairs. When paragraph 2 of the schedule deals with the average amount that the injured person is able to earn after the accident, the inquiry is not limited to earnings under an employer, for the man may be his own master.

MATHEW L.J. concurred.

Appeal allowed.

Solicitors for appellants: *Treadwell & Aylwin.*
Solicitors for respondent: *J. K. Nye & Treacher, Brighton.*

A. M.

C. A. 1904 *April* 13.

[IN THE COURT OF APPEAL.]

ANDREW *v.* FAILSWORTH INDUSTRIAL SOCIETY, LIMITED.

Employer and Workman—Workmen's Compensation—Accident arising out of Employment—Injury by Lightning—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 1.

Where the place and circumstances in which a workman is employed involve a greater than ordinary risk of injury by lightning, such an injury may be considered as caused by an accident arising out of his employment within the meaning of the Workmen's Compensation Act, 1897, s. 1, sub-s. 1.

APPEAL against the award of the judge of the Oldham County Court upon a claim for compensation by the widow of a deceased workman under the Workmen's Compensation Act, 1897.

The deceased man, who was a bricklayer, was killed by lightning while working on a scaffolding at a height of about twenty-three feet from the ground on a building which his employers were engaged in erecting, and which exceeded

thirty feet in height. A witness, who was an engineer and an electrician, was called before the county court judge, and gave evidence as follows: "I have been told of the place and circumstances in which the deceased man was working. He was on a scaffold twenty-three feet from the ground. I consider that a very exposed position. If it is wet, the danger is increased. The main fact is the elevation above the earth. Another feature is that he would constitute a well-defined point at which a discharge would be more likely to occur. Buildings and other erections afford protection over a space which diminishes as you ascend vertically. If you draw a line at an angle of forty-five degrees from the highest point of an erection to the earth, persons within the cone are protected; and it is, therefore, clear that, as you ascend, the zone of safety diminishes. I consider that a man working on an elevated scaffold runs an appreciably greater risk from that fact." Another expert witness stated that he considered that a dangerous factor would be the moist condition of the brickwork causing a great accumulation of electricity. The county court judge found that the accident by which the deceased man was killed arose out of and in the course of his employment, and made an award in favour of the applicant.

Arthur Powell, K.C., and *Adshead Elliott*, for the employers. Injury occasioned to a man by lightning, while he is engaged in his employment, cannot in such a case as this be said to be caused by an accident arising out of the employment. It is clear that it is not enough that the accident should arise in the course of the employment: *Armitage* v. *Lancashire and Yorkshire Ry. Co.* (1) It must have some connection with the work on which the workman is employed, and be something which can be considered as incidental to the nature of the employment. When a thunderstorm occurs, every one in the locality runs a certain amount of risk of being injured by lightning, and the degree of that risk must vary indefinitely according to the position of the individual and other circumstances, but such a risk cannot be said to be incidental to the nature of the

(1) [1902] 2 K. B. 178.

C. A. 1904

ANDREW v. FAILSWORTH INDUSTRIAL SOCIETY.

employment of a bricklayer. In *Falconer* v. *London and Glasgow Engineering and Iron Shipbuilding Co.* (1), Lord Trayner uses the case of a workman in a factory struck by lightning in the course of his employment by way of illustration, as an example of a case in which the accident could not be said to arise out of the employment, and there could be no claim for compensation under the Act. There was really no evidence of any special risk from lightning incidental to the nature of the particular employment in this case. All that the evidence came to was that there was more risk of a man's being struck by lightning in an exposed position twenty-three feet above the ground than there would be if he were under shelter or on the ground. But the circumstances of being at a moderate height from the ground, and not being under shelter, cannot fairly be considered as special features of the employment.

[They also cited *Fenton* v. *Thorley & Co.* (2)]

C. A. Russell, K.C., and *Holman Gregory*, for the applicant, were not called upon to argue.

COLLINS M.R. In the result this appears to me a very clear case. Any difficulty which primâ facie existed has, I think, been entirely removed by the lucid judgment of the county court judge. I do not think I can improve upon the passage in his judgment in which he formulates and deals with the precise point raised by the facts of the case. He says, "The question is, did the accident arise out of the employment? It no doubt arose in the course of the employment, but that is not sufficient: it must also arise out of the employment. Mr. Elliott says the accident must arise out of the work which the man was doing; and he says that, if there was no connection between the work and the accident, then it does not arise out of the employment. I am bound to say that I cannot agree to that. Though it may not be connected with, or have any relation to, the work the man was doing, yet, if in point of fact the position in which the man was doing the work, and the place he must necessarily occupy whilst doing the work are a

(1) (1901) 3 F. 564. (2) [1903] A. C. 443.

position and a place of danger which caused the accident, it may fairly be said that it arose out of the employment, not because of the work, but because of the position. In this case, therefore, if I come to the conclusion that, as a matter of fact, the position in which the man was working was dangerous, and that, in consequence of the dangerous position, the accident occurred, I could fairly hold that the accident arose out of the employment. Now was it a dangerous position? Was the man exposed to something more than the normal risk, which everybody, so to speak, incurs at any time and in any place during a thunderstorm? We know that lightning is erratic, and possibly no position or circumstances can afford absolute safety. But, if there is under particular circumstances in a particular vocation something appreciably and substantially beyond the ordinary normal risk, which ordinary people run, and which is a necessary concomitant of the occupation the man is engaged in, then I am entitled to say that the extra danger to which the man is exposed is something arising out of his employment; and, if, in consequence of that extra danger, a fatality occurs, I am entitled to say that the section applies, and the applicant is entitled to recover." I should be unable, I think, to frame a more accurate direction than this, if I had to direct a jury in such a case. Having so directed himself, the learned county court judge proceeds to address himself to the facts, in order to see whether there was evidence which warranted him in coming to the conclusion that the accident arose out of the employment; and it appears to me that the evidence, to which he referred, abundantly justifies the conclusion at which he arrived. The case of a workman's being struck by lightning, while in the course of his employment, might very well be taken, speaking generally, and with regard to most employments, as a typical illustration of an accident, not arising out of the employment but as being on the contrary primâ facie an instance of something arising altogether outside it, because it is a risk which would be incidental only to a small class of employments: and in that sense, no doubt, it was used as an illustration by Lord Trayner in the case of *Falconer* v. *London and Glasgow Engineering and Iron Ship-*

C. A. 1904

ANDREW v. FAILSWORTH INDUSTRIAL SOCIETY.

building Co. (1) But it does not appear to me fair to cite the illustration so used in that case as applicable to the case of an employment where special circumstances exist, the absence of which was assumed when it was used, and which render the risk of such an accident one incidental to the employment. For these reasons I think that the appeal must be dismissed.

ROMER L.J. and MATHEW L.J. concurred.

Appeal dismissed.

Solicitors for applicant: *Field, Roscoe & Co., for G. P. Fripp, Oldham.*

Solicitors for employers: *William Hurd & Son, for Chapman & Brooks, Manchester.*

E. L.

C. A. 1904 *April* 13.

[IN THE COURT OF APPEAL.]

DYER *v.* SWIFT CYCLE COMPANY, LIMITED.

Employer and Workman — Workmen's Compensation — Factory — Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2—*Factory and Workshop Act*, 1901 (1 *Edw.* 7, *c.* 22), *s.* 105, *sub-s.* 2 (*b*).

The fact that a building comes within s. 105, sub-s. 2 (*b*), of the Factory and Workshop Act, 1901, as being a building which exceeds thirty feet in height, and in which more than twenty persons, not being domestic servants, are employed for wages, does not make such a building a "factory" for the purposes of the Workmen's Compensation Act, 1897.

APPEAL against the award of Judge Rentoul of the City of London Court upon a claim for compensation made by a workman against his employers under the Workmen's Compensation Act, 1897.

The injury, in respect of which compensation was claimed, had been occasioned to the workman by an accident while cleaning a bicycle in a building belonging to his employers, which exceeded thirty feet in height, and in which more than twenty persons, not being domestic servants, were employed for wages. There was no machinery or plant worked by

(1) 3 F. 564.

steam, water, or other mechanical power upon the building, which was used for the purpose of shewing and selling bicycles and tricycles, and doing a certain amount of repair to them. The learned judge held that the building in which the workman was employed, being within s. 105 of the Factory and Workshop Act, 1901, was a factory for the purposes of the Workmen's Compensation Act, 1897 (1), and awarded compensation accordingly.

Addington Willis, for the employers. The building in question was not a factory within the definition of "factory" given by the Workmen's Compensation Act, 1897, s. 7, sub-s. 2. It was not shewn to be a factory within the definition of "factory" given by the Factory and Workshop Act, 1901, s. 149, nor was it shewn to come within any of the other classes of things included in the definition of "factory" contained in the Workmen's Compensation Act, 1897, s. 7, sub-s. 2; nor was there any machinery worked by steam, water, or other mechanical power used therein. The learned judge seems to have thought that the fact that it was a building, to which, under the Factory and Workshop Act, 1901, s. 105, sub-s. 2, certain provisions of that Act were made applicable, constituted it a factory for the purposes of the Workmen's Compensation Act, 1897. But that sub-section does not make such a building a factory for the purposes of the Factory and Workshop Act, 1901. It really provides that, not being a factory, it shall, nevertheless, be subject to certain provisions of the Act, as if it were a factory.

A. Cairns, for the workman. The Workmen's Compensation Act, 1897, s. 7, sub-s. 2, does not say that the building must come within the definition of "factory" given in the Factory and Workshop Acts, in order to come within the Workmen's

(1) The Factory and Workshop Act, 1901, s. 105, sub-s. 2, provides as follows: "The provisions of this Act with respect to notice of accidents and the formal investigation of accidents shall have effect as if (*b*) any building which exceeds thirty feet in height and in which more than twenty persons, not being domestic servants, are employed for wages, were included in the word 'factory,' and as if the occupier of the building were the occupier of a factory."

C. A. 1904

DYER v. SWIFT CYCLE COMPANY.

Compensation Act, 1897. It says that the term "factory" shall have the same meaning as in the Factory and Workshop Acts. It is submitted that, inasmuch as s. 105 of the Factory and Workshop Act, 1901, applies certain provisions of that Act to a building which exceeds thirty feet in height and in which more than twenty persons, not being domestic servants, are employed, the term "factory" as used in that Act may be said to mean such a building.

Addington Willis, for the employers, was not called upon to reply.

COLLINS M.R. This is an appeal against the award of the judge of the City of London Court upon a claim for compensation under the Workmen's Compensation Act, 1897. The question is whether the building upon which the workman was employed, when he met with the accident in respect of which compensation was claimed, was a factory within the meaning of the Workmen's Compensation Act, 1897. The judge of the City of London Court decided that it was such a factory. He found in favour of the employers that there was no such machinery or plant used in the building as could bring the case within the Workmen's Compensation Act, 1897, s. 7, sub-s. 2. But it was contended on behalf of the workman that, though that was so, and though the building did not come within the definition of a "factory" in the Factory and Workshop Act, 1901, s. 149, which must now be taken as substituted for the definition of a "factory" in the former Factory Acts for the purposes of the Workmen's Compensation Act, 1897, s. 7, nevertheless, inasmuch as the building admittedly exceeded thirty feet in height, and more than twenty persons, not being domestic servants, were employed therein for wages, it came within s. 105, sub-s. 2, of the Factory and Workshop Act, 1901, and was therefore brought within the definition of a "factory" given in the Workmen's Compensation Act, 1897; and the learned judge adopted that contention. But when s. 105, sub-s. 2, of the Factory and Workshop Act, 1901, is looked at, it will be found that it distinctly negatives the idea that a building coming within its terms is a factory within the meaning

of the Act. It simply provides that certain provisions of the Act shall apply to such a building, as if it were included in the word "factory"; which is equivalent to saying that it is not a factory, but for certain purposes only shall be treated as such. The provisions, for the purposes of which such a building is to be treated as a factory, are confined to those with regard to giving notice of accidents and the investigation of accidents. Then, is the effect of this enactment that such a building is brought within the definition of a "factory" contained in the Workmen's Compensation Act, 1897, s. 7, sub-s. 2? That sub-section provides that "'Factory' has the same meaning as in the Factory and Workshop Acts, 1878 to 1891," for which must now be substituted the Factory and Workshop Act, 1901. This building does not come within those words. Then the section goes on to provide that the word "factory" shall also include "any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895, and every laundry worked by steam, water, or other mechanical power." The building in this case is not within any of the classes of things so enumerated. It is not a dock, wharf, or quay. It was not shewn to be a warehouse, nor does it come within any of the other terms used in the sub-section. It is a building to which certain provisions of the Factory and Workshop Act, 1901, are made applicable, but it is not one which can be brought within the definition of a "factory" given by the Workmen's Compensation Act, 1897.

ROMER L.J. I am of the same opinion. In order to bring the case within the provisions of the Workmen's Compensation Act, 1897, it was necessary for the workman to shew that he was employed on, or in, or about a "factory" within the definition of "factory" given by that Act. I think that, when that definition is looked at, it appears clear that he failed to establish that the building, in which he was employed, came within it. The learned judge seems to have thought that the building might be regarded as a factory by reason of the provisions of the Factory and Workshop Act, 1901, s. 105, sub-s. 2.

C. A. 1904

DYER v. SWIFT CYCLE COMPANY.

Romer L.J.

But, as the Master of the Rolls has pointed out, when that sub-section is referred to, it will be seen that it does not provide that every building such as is therein described shall be a factory. It really recognises that such a building is not a factory, but provides that it shall be subject to certain provisions of the Act, as if it were a factory. When those provisions are looked at, they appear to have no relation to the purposes of the Workmen's Compensation Act, 1897. It therefore seems to me that the decision of the judge was clearly wrong.

MATHEW L.J. concurred.

Appeal allowed.

Solicitors for workman: *Lovett & Liddle.*
Solicitors for employers: *Gibbs, White & Strong.*

E. L.

C. A. 1904 *April* 22.

[IN THE COURT OF APPEAL.]

GIBSON *v.* WORMALD & WALKER, LIMITED.

Employer and Workman—Arbitration—Arbitrator appointed by County Court Judge—Right of Appeal—Workmen's Compensation Act, 1897 (60 & 61 *Vict.* c. 37), *2nd Schedule*, (2), (3), *and* (4).

An appeal will not lie direct to the Court of Appeal upon the award of an arbitrator appointed by a county court judge under clause 2 of the 2nd schedule to the Workmen's Compensation Act, 1897.

APPEAL from the award of an arbitrator under the Workmen's Compensation Act, 1897.

The case was heard by an arbitrator appointed by the county court judge of Dewsbury under the authority of the Lord Chancellor. The arbitrator heard the case and made an award in favour of the applicant. He was not asked, at the time when he made his award, to submit any question of law for the decision of the county court judge. An application was made to him at a subsequent date to submit a question of law, but he refused to do so on the ground that he was functus officio, and had no power to state a case.

The employers appealed direct to the Court of Appeal.

When the case came on for hearing, a preliminary objection was taken on behalf of the applicant.

Compston, for the applicant, in support of the objection. There is no appeal to the Court of Appeal in such a case as the present one. The only way in which the decision of an arbitrator appointed by a county court judge can be reviewed is that pointed out in clause 4 of Sched. II. of the Act, which says: "The Arbitration Act, 1899, shall not apply to any arbitration under this Act; but the arbitrator may, if he thinks fit, submit any question of law for the decision of the county court judge." For the purposes of the arbitration the arbitrator, under clause 3, has all the powers of a county court judge; but it was pointed out in *Leech* v. *Life and Health Assurance Association* (1), with respect to clause 4, that "The only appeal given by that clause is from the decision of the county court judge on a question of law, either on such submission, that is, the submission of a question of law by an arbitrator, or in any case where he himself settles the matter under the Act, that is the matter to be settled by arbitration under the schedule." Rule 30 of the Workmen's Compensation Act Rules, 1898, provides that the submission by an arbitrator of a question of law for the decision of the judge is to be in the form of a special case.

Scott Fox, K.C. (with him *H. W. W. Wilberforce*), for the employers. This appeal raises a question of law, and so is within the subject-matter of clause 4. The decision in the case cited was that the subject-matter of the appeal was outside the scope of that clause. If the provisions of Sched. II. are taken together, it appears that such an arbitrator as the one in this case is in the position of a county court judge. It is conceded that in the case of two of the four tribunals that may decide an application for an award there is no appeal to this Court—those are a representative committee or an arbitrator agreed on by the parties. With regard to an arbitrator appointed by the county court judge, he may submit a point of law to the

(1) [1901] 1 K. B. 707, at p. 709.

C. A. 1904

GIBSON v. WORMALD & WALKER, LIMITED.

judge, but if he does not do so he leaves the parties to their appeal. If this is not so, such an arbitrator would have greater power over the litigation than the judge himself, for he could, by refusing to state a case, decide a point of law without appeal. To give a reasonable interpretation to clause 4 and to carry out the general scheme of the Act the word "arbitrator" in the clause should be restricted to the representative committee and an arbitrator agreed on by the parties. It may be pointed out with reference to rule 30 that rules cannot govern the construction of the Act. There is an alternative between two difficulties, either restricting the operation of clause 4 as suggested, or holding that an arbitrator has greater power than a county court judge, and it is submitted that the former alternative should be chosen in order to carry out the intention of the Legislature.

COLLINS M.R. I am of opinion that the preliminary objection to the hearing of this appeal succeeds.

The question turns on the provisions of the 2nd schedule to the Workmen's Compensation Act, 1897. Clause 4 provides the only way in which a decision of a tribunal of first instance constituted under the Act can be reviewed by the Court of Appeal, and in that clause there is a distinction drawn between an arbitration before a county court judge and one that is held before an arbitrator. The only way in which a decision can be reviewed in the latter case is that, if the arbitrator thinks fit, he may submit any question of law for the decision of the county court judge, whose decision upon such submission would, subject to the rules, be open to appeal. It is said that when we look at the other clauses of the schedule it appears that the Legislature must have intended to give an appeal from the decision of an arbitrator appointed by the county court judge, and it is pointed out in particular that clause 3 gives to such an arbitrator all the powers of a county court judge. The answer to that contention is that the right of appeal is a matter outside the powers of the county court judge, and consequently outside the powers conferred on the arbitrator. The right of appeal from the judge arises aliunde, and the right to review the

decision of an arbitrator must also arise aliunde. A strong appeal was made to us on the ground of the anomalies that would arise from holding that there was no direct appeal from the decision of an arbitrator appointed by a county court judge. We were asked in effect to say, not merely that such an arbitrator had all the powers of the judge, but that his decision was open to the same review as that of the judge, on the ground that this was a casus omissus, and that we should be carrying out the intention of the Legislature. With regard to this it should be remembered that the Act was necessarily passed before any of its provisions could be tried by the test of practice. It is probable that the Legislature had before them the view that proceedings under the Act were generally to be by arbitration before a committee or an arbitrator, and not proceedings of a technical legal character. The primary idea seems to have been that of an arbitration not open to review, and dealt with by non-technical process. An appeal was given in cases before the county court judge, but in other cases the only appeal given is where the arbitrator thinks fit to submit a question of law for the decision of the county court judge. It does not appear, in this view of the matter, that the present is a casus omissus, for it is reasonable to suppose that the intention of the Legislature was carried out in the provisions of the Act. The only method of reviewing the decision of an arbitrator is by submission of a point of law to the county court judge, and consequently no appeal lies direct to this Court, and the preliminary objection to our hearing this appeal succeeds.

ROMER L.J. and MATHEW L.J. concurred.

Appeal dismissed.

Solicitors for applicant: *Telfer, Leviansky & Co., for Clegg & Son, Sheffield.*

Solicitors for employers: *Walker & Rowe, for F. Dwyer, Dewsbury.*

A. M.

C. A.
1904
April 20, 21, 22.

[IN THE COURT OF APPEAL.]

WILLIAMS AND OTHERS *v.* NORTH'S NAVIGATION COLLIERIES (1889), LIMITED.

Employer and Workman—Truck Acts—Deduction from Wages—Set-off—Debt due from Workman to Employer—Truck Act, 1831 (1 & 2 *Will.* 4, *c.* 37), *ss.* 3, 9.

The Truck Act, 1831, does not make illegal the deduction by an employer from wages earned by a workman of the amount of a lawful debt due from the workman to the employer.

Chawner v. *Cummings*, (1846) 8 Q. B. 311, followed.

APPEAL against an order of Bucknill J. at chambers, granting an interim injunction until the trial of the action.

The action was brought by workmen against their employers to recover amounts deducted from their wages by the employers as after mentioned, and claiming a declaration that such a deduction was illegal under the Truck Act, 1831, and an injunction to restrain the defendants from making similar deductions from wages in future.

The plaintiffs having absented themselves from work in breach of their contracts of employment, the defendants proceeded against them for breach of contract before a Court of summary jurisdiction, under the Employers and Workmen Act, 1875; and the magistrates made an order against each of the plaintiffs for the payment of 30*s.* by way of damages, to be payable by three fortnightly instalments of 10*s.* each, upon dates on which the plaintiffs' fortnightly wages were payable. Upon the first of these dates the defendants paid to each of the plaintiffs respectively the amount of his fortnightly wages less 10*s.* On an application to Bucknill J. at chambers he granted an interim injunction to restrain the defendants from making such deductions in future until the trial of the action. The defendants appealed. Upon the matter coming on for hearing as an interlocutory appeal before Collins M.R. and Romer L.J., the Court were, after some discussion, of opinion

that the case was not one which could properly be dealt with as an interlocutory matter by two judges, and it was ultimately arranged that the appeal should go into the final list and the hearing of it should be treated as the trial of the action. The plaintiffs at the same time withdrew their claim to recover the amounts already deducted from wages, admitting that the employers' right of setting off the sums deducted in an action for the wages unpaid was not affected by the Truck Act, 1831, and it was also agreed that the claim for an injunction should be withdrawn, leaving only the claim for a declaration that the deductions were illegal as being contrary to the Truck Act, 1831. (1)

Bankes, *K.C.*, and *Montague Lush*, *K.C.* (*A. J. Ashton* with them), for the defendants. The Truck Act, 1831, deals with the mode of payment of wages, and not with non-payment of them or part of them. The object of the Act, as indicated in the title and preamble, is to prohibit the payment of wages in goods, or otherwise than in current coin of the realm. The various sections, when read with reference to the preamble, and the scope of the Act as a whole, will be seen to be all directed to that object. The first part of s. 3 ought not to be isolated from the context. Reading it in connection with the concluding part of the section, and the rest of the Act, it is clear that it is aimed at the payment of wages otherwise than in money, and not at non-payment of wages. It is treating it in a manner altogether foreign to the general scope of the Act to read it as prohibiting the employer on payment of wages from deducting an amount legally due from the workman to him. It is not, and cannot be, denied that, if an employer is sued for wages, he can set off such amounts as were here

(1) The Court expressed considerable doubt during the argument whether, in the circumstances of the case, a declaration could properly be made, inasmuch as it was admitted that it would not be ancillary to any other civil remedy to be put in suit by the plaintiffs; but, as will be seen, both parties being desirous that the Court should decide the question whether on the true construction of the Truck Act, 1831, an employer on payment of wages to a workman is entitled to deduct the amount of a legal set-off which he has against the workman, the Court allowed the case to be argued out with the result hereafter appearing.

C. A. 1904

WILLIAMS v. NORTH'S NAVIGATION COLLIERIES (1889), LIMITED.

deducted from the wages. Sect. 5 expressly provides that the employer shall not, in an action brought by the workman for wages, be allowed to make any set-off in respect of goods supplied, and does not forbid the setting off of a debt such as that here in question. It cannot have been intended that, although the employer is allowed by the Act to set off such a debt as this due from the workman in an action for wages, it should be an offence under, or contrary to the Act, for the employer to deduct it on payment of the wages. Such a deduction is clearly not the subject of a penalty under s. 9 of the Act, which only imposes a penalty in cases where there has been a contract or payment declared by the Act illegal, namely, a contract to pay, or a payment of, wages otherwise than in money. It is impossible to suppose that the penalty clause was not intended to be coextensive with the general scope of the Act, or that, if the Legislature had intended to make the deduction from wages of a sum due from the workman to the employer unlawful under the Act, they would have provided no mode of enforcing the provisions of the Act in that respect. In some cases, no doubt, where a statute imposes a duty, and gives no specific remedy, an indictment for misdemeanour will lie for non-performance of the duty, but it is in the last degree unlikely that, if the intention of the Legislature had been as suggested for the plaintiffs, they would not have provided some more convenient remedy. In all the cases from *Chawner* v. *Cummings* (1) onwards, with the exception of *Hewlett* v. *Allen* (2), the judges have treated the Truck Act, 1831, as dealing with the mode of payment of wages, and not with non-payment of them. It is true that in *Hewlett* v. *Allen* (2) Bowen L.J. used some expressions which, taken by themselves, might seem favourable to the plaintiffs, but it is obvious that the question raised in this case was not then present to his mind. If the plaintiffs' contention is correct, it was quite unnecessary to pass the Truck Act, 1896 (59 & 60 Vict. c. 44), which prohibits deductions for fines, except in certain specified cases, for such deductions would have been unlawful under the Truck Act, 1831.

(1) 8 Q. B. 311. (2) [1892] 2 Q. B. 662; [1894] A. C. 383.

[They also referred to *Archer* v. *James* (1); *Willis* v. *Thorp* (2); *Smith* v. *Walton* (3); *Redgrave* v. *Kelly* (4); *Beetham* v. *Crewdson* (5); *Fisher* v. *Jones* (6); *Owner* v. *Hooper* (7); the Hosiery Manufacture (Wages) Act, 1874 (37 & 38 Vict. c. 48); the Truck Act, 1887 (50 & 51 Vict. c. 46).]

Rufus Isaacs, K.C., and *S. T. Evans, K.C.* (*Bailhache* and *J. Sankey* with them), for the plaintiffs. The main cause which led to the passing of the Truck Act, 1831, may have been the practice of paying wages in goods, or otherwise than in coin, but it does not follow that the scope of the Act is absolutely confined to the prohibition of that practice. It is submitted that the plain meaning of the first part of s. 3 of the Act is that the total amount of the wages shall be paid in money, subject only to the deductions authorized by s. 23, leaving it open to the employer to recover any legal cross-claim which he may have against the workman by proceedings in the appropriate Court. The workman's weekly or fortnightly wages being necessary for the support of himself and his family, the intention is that deductions by the employers of alleged cross-claims, which may render the wages for the time being payable insufficient for the support of the workman, shall be inadmissible. If the employer sues the workman for the cross-claim, the county court, or other court in which the proceedings are taken, may order payment by such instalments or on such terms as will not unduly trench upon the workman's means of subsistence for the time. The satisfaction of an amount due by setting it off in account against a cross-claim may without any very great straining of language be looked on as a payment otherwise than in money. The legalization of certain specific deductions in s. 23 tends to shew that other deductions from wages without the assent of the workman are forbidden. In all the other cases in which deductions from wages are said to have been allowed by the

(1) (1862) 2 B. & S. 67.
(2) (1875) L. R. 10 Q. B. 383.
(3) (1877) 3 C. P. D. 109.
(4) (1889) 54 J. P. 70.
(5) (1890) 55 J. P. 55.
(6) (1863) 32 L. J. (M.C.) 177.
(7) (1903) 19 Times L. R. 601.

C. A. 1904

WILLIAMS v. NORTH'S NAVIGATION COLLIERIES (1889), LIMITED.

Court, there was either something amounting to a previous assent to them by the workman, or by the terms of the contract the amount of wages could not be ascertained till after certain allowances had been made, so that there was no question properly speaking of any deduction from wages. There is really no authority which shews that a deduction from wages in respect of a cross-claim without the previous assent of the workman is permissible under the Truck Act, 1831, except where authorized by s. 23. The expressions used by Bowen L.J. in *Hewlett* v. *Allen* (1) clearly shew that he construed the Act in conformity with the plaintiffs' contention. An action will lie for non-performance of a duty imposed by a statute at the suit of a person individually damaged thereby. The Legislature may not have thought it necessary to impose criminal penalties on non-payment of wages, but only on payment of them in goods, or otherwise than in current coin.

[They also cited *Ex parte Cooper* (2); *Lamb* v. *Great Northern Ry. Co.* (3); *Pillar* v. *Llynvi Coal and Iron Co.* (4)]

Bankes, K.C., in reply.

Cur. adv. vult.

April 22. COLLINS M.R. This is an appeal from an order made by Bucknill J. at chambers, whereby he granted an interlocutory injunction in an action brought by workmen against their employers for non-payment in full of certain wages alleged to be due to them. The plaintiffs sought to recover the amount of certain deductions which had been made on the payment of those wages, and they claimed a declaration that such deductions were illegal, and an injunction to restrain the defendants from making any further deductions of the same kind. When the case first came before Romer L.J. and myself as an interlocutory matter, we came to the conclusion that it could not be conveniently dealt with in that way, and, if it were so dealt with, it could only be by discharging the injunction and leaving the real question in the case to be

(1) [1892] 2 Q. B. 662; [1894] A. C. 383.
(2) (1884) 26 Ch. D. 693.
(3) [1891] 2 Q. B. 281.
(4) (1869) L. R. 4 C. P. 752.

determined at the trial. Both parties, however, were desirous that this Court should deal with the merits of the case as a whole, and it was accordingly arranged to treat the case as a final appeal and to let it be dealt with by a full Court of three judges. To bring about that result the plaintiffs were obliged to throw over the greater part of their suggested cause of action and to confine themselves to claiming a declaration by the Court on the question which both parties desired to have decided, namely, whether a set-off against wages insisted on by an employer at the time of the payment of wages was a violation of the Truck Act, 1831. We felt that there would be a difficulty in making the declaration which the plaintiffs asked for, even if we should be of opinion that such a set-off was a violation of the statute, because, even on the view of the plaintiffs, who asked for it, the declaration would not be ancillary to the putting in suit of any legal right. But with a view to meet the pressure which was put on us by both sides rather than from an opinion that the case could satisfactorily be dealt with by making such a declaration, we agreed to hear the case and determine it, as far as possible, on its merits.

The question arises in this way. The employers had a ground of complaint against their workmen in respect of a breach of the contract between them, which gave the employers a remedy sounding in damages. This remedy they put in suit before a Court of summary jurisdiction under the Employers and Workmen Act, 1875, which provides that such matters may be dealt with by such a Court, with the result that the magistrates gave judgment against each of the workmen for an amount of 30*s.*, payable by fortnightly instalments, and by their order they appointed as the dates of payment of the instalments days which coincided with the usual days for the payment of the men's wages. On the next occasion when the wages came to be paid, the employers set off the sum of 10*s.*, which by the exigency of the judgment of the magistrates was payable to them by each of the workmen on that day, against the sum which was payable by them as wages to each of the workmen. It is alleged that this was a violation of the Truck Act, 1831, notwithstanding the fact, which the plaintiffs'

C. A. 1904

WILLIAMS v. NORTH'S NAVIGATION COLLIERIES (1889), LIMITED.

Collins M.R.

counsel were compelled to admit, that under the terms of the Act the very sum, which it was said to be a violation of the Act for the employers to retain, could have been set-off by the employers in proceedings instituted by the workmen to recover wages due to them. Notwithstanding the preservation by the Legislature of this right of set off, it was alleged that it was contrary to the provisions of the Act, if an employer availed himself of it at the time when he paid his men their wages, though he could, by authority of the statute, avail himself of it next day in proceedings by the workmen to recover those wages. I do not think that anything ought to be treated as an offence in this country under a statute, unless the statute in plain terms constitutes it one. Now, has the Truck Act, 1831, constituted it an offence for an employer to withhold from a workman on payment of his wages an amount in respect of which he, the employer, has a legal right of set-off against the workman—namely, the amount of a judgment obtained by him against the workman? It has been emphasized in a series of cases that the object of the Truck Act, 1831, is what is expressed in its title and preamble. It is intituled, "An Act to prohibit the payment in certain trades of wages in goods, or otherwise than in the current coin of the realm." The preamble is: "Whereas it is necessary to prohibit the payment in certain trades, of wages in goods, or otherwise than in the current coin of the realm." This therefore is the main end and object of the Act. Sect. 1 accordingly provides that in all contracts for the hire of any artificer the wages shall be made payable in the current coin of the realm, and not otherwise. That clearly gives effect to the main object—namely, the prohibition mentioned in the preamble. Then s. 2 provides that the contract must not contain any stipulations as to the manner in which wages shall be expended. That is another provision calculated to give effect to the same main end. Then comes s. 3, the section with which we have to deal in this case. It provides as follows: "The entire amount of the wages earned by or payable to any artificer, in respect of any labour by him done, shall be actually paid to such artificer in the current coin of this realm, and not otherwise; and every

payment made to any such artificer by his employer of or in respect of any such wages, by the delivering to him of goods or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be and is hereby declared illegal, null, and void." It is sought by the plaintiffs to get out of the terms of that section that which appears to me, having regard to its place in the series of sections, and the central purpose of the Act, not to be contained in it, namely, an absolute obligation on the employer, where wages have been earned by a workman, whether he has a set-off or not, to pay the workman the whole amount of the nominal sum which but for any such set-off would be payable as wages. It is said that a failure to do that is contrary to the provisions of the Act. The plaintiffs shrank from contending that it is a criminal offence; but they say that they will be satisfied if it is declared to be contrary to the Act. When the words of the section are looked at, they seem to me merely to constitute a provision calculated to carry out the central purpose of the Act, namely, that wages should not be paid otherwise than in money. They deal with the mode of payment, not with the amount to be paid. The section seems to point to the possibility of the employer not being bound to pay the whole amount of the wages earned by the workman, for it speaks of the amount of the wages earned by, "or payable to," any artificer. We ought not to reject the words "or payable to." They seem to me to shew what the Legislature had in view. First it has to be ascertained what the amount of the obligation of the employer to the workman is—what sum he has to pay for wages. That is spoken of as "wages earned by or payable to" the workman. When that amount has been ascertained, the section provides how it shall be paid, namely, in current coin of the realm, and not otherwise. That seems to me to be primâ facie the natural meaning of the section. But the matter does not stand there. Following out the provisions of the Act, we come to the rights and remedies given in contemplation of a breach of its provisions. Sect. 4 provides that the workman may recover from his employer in the manner by law provided for the recovery of servants' wages, or by any other lawful

C. A. 1904

WILLIAMS v. NORTH'S NAVIGATION COLLIERIES (1889), LIMITED.

Collins M.R.

ways and means, the whole or so much of the wages earned by him as shall not have actually been paid to him in current coin of the realm, thus shewing that the Legislature contemplated the recovery of the wages by the workman in a civil proceeding, in which primâ facie the employer would be entitled to set off against the workman such a debt as that here in question, and to the extent of that debt the workman could not recover the wages. Then we come to s. 5, which expressly deals with the question of set-off, and provides that in any proceeding for the recovery of wages by the workman the employer "shall not be allowed to make any set-off, nor to claim any reduction of the plaintiff's demand, by reason or in respect of any goods, wares, or merchandise had or received by the plaintiff as or on account of his wages or in reward for his labour, or by reason of or in respect of any goods, wares, or merchandise sold, delivered, or supplied to such artificer at any shop or warehouse kept by or belonging to such employer, or in the profits of which such employer shall have any share or interest." That again is another provision ancillary to the main object of the Act, and emphasizing the fact that the Legislature do not intend to interfere with the existing law, except so far as is necessary in order to carry out that object, namely, that wages shall not be paid otherwise than in money. It leaves untouched the right of set-off, except in cases where a set-off would contravene the main purpose of the Act. It appears to me that by necessary implication that section involves a statutory recognition and sanction of all rights of set-off as against wages which are not struck at by the Act, for it shews that the Legislature contemplated the right of set-off as against wages as still existing, notwithstanding the previous provisions of the Act, and proceeded only in certain cases to interfere with it. Then comes s. 6, which debars an employer from suing a workman for the price of goods supplied to him on account of wages. The only other section to which I need refer is s. 9, which provides that, "Any employer of any artificer, who shall, by himself or by the agency of any other person or persons, directly or indirectly enter into any contract, or make any payment,

hereby declared illegal, shall for the first offence forfeit a sum not exceeding ten pounds, and for the second offence a sum not exceeding twenty pounds nor less than ten pounds, and in case of a third offence, any such employer shall be and be deemed guilty of a misdemeanour, and, being thereof convicted, shall be punished by fine only, at the discretion of the Court, so that the fines shall not in any case exceed the sum of one hundred pounds." So that the only offences in respect of which the Legislature has created any machinery for enforcing the Act are those of entering into a contract, or making a payment, declared by the Act to be unlawful, i.e., a contract to pay or a payment of wages otherwise than in money; and the section does not make it an offence to withhold money due for wages on account of a legal set-off, or provide any penalty in respect of such withholding. The Truck Act, 1831, has been followed by other Acts, by which fresh matters arising have been dealt with, but I do not think that any of the provisions of those Acts has dealt with the matter now in question.

The provisions of the Truck Act, 1831, have been made the subject of decision from time to time. Cases have arisen in which, there having been some previous arrangement between an employer and a workman, whereby the employer was to be entitled to make certain deductions in respect of facilities given to the workman, as for instance, for the use of machinery in the hosiery trade, or in respect of fines, the employer has claimed to withhold sums earned as wages on account of such deductions; and the point has been taken in those cases that what was done amounted to a payment declared illegal by the Act, i.e., that paying an amount arrived at by means of such a deduction was an unlawful payment. But it was pointed out that a payment could not be treated as an illegal payment, because the amount paid was arrived at after a deduction, that not being a breach of the Act, which dealt with payments, not with deductions. I will refer to the first case on the subject, namely, *Chawner* v. *Cummings*. (1) Lord Denman C.J. there said, in giving judgment: "In order to form a correct judgment upon the nature of this agreement and of these deductions, it

(1) 8 Q. B. 311.

C. A. 1904

WILLIAMS v. NORTH'S NAVIGATION COLLIERIES (1889), LIMITED.

Collins M.R.

is necessary to attend to the provisions of the Act with some particularity. It was directed, as is well known, against what has been called generally the truck system, or, as the title of the Act is, against the payment of wages in certain trades in goods or otherwise than in the current coin of the realm. The prohibition extended to bank-notes, because the eighth section expressly legalizes payment by them under certain circumstances. The same purpose is declared in the preamble, and in the same terms, and is pursued in the earlier sections of the Act. The first section declares all contracts illegal, where the wages are made payable in any other manner than in the current coin. The second section avoids all contracts where there is any provision as to the place or manner in which the wages, or any part, are to be expended. Sect. 3 makes all payments, except as aforesaid, illegal and void; and the fourth section contains the proviso already referred to, that the artificer may recover his wages as if such prohibited payments had not been made; and the fifth section, also before noticed, takes away the right of set-off in such cases. Now it is to be observed that payment otherwise than in money is alone prohibited. Deductions or charges are nowhere mentioned or alluded to before the twenty-third section, hereafter to be considered. Then are these deductions in the nature of payment at all? It seems to us to be the mode of calculating the amount of wages, and nothing more." The same principle was followed in subsequent cases. In deducting the amount of a set-off allowed by law, and sanctioned by the judgment of the magistrates, from the amount of wages earned, all that was done was to calculate the amount payable to the workman for wages, and the payment of the amount so found to be due in coin cannot be said to be a violation of the Act. The offence created by the Act is not non-payment, but making a payment contrary to the Act, i.e., otherwise than in money. The simple principle so laid down in *Chawner* v. *Cummings* (1) seems to me to have always been followed since, and never to have been questioned. The fact that, with regard to a particular trade, namely, the hosiery trade, an Act was passed in 1874, making deductions

(1) 8 Q. B. 311.

other than those specified in the Act illegal in that trade, only seems to emphasize the conclusion that such deductions are not forbidden by the Truck Act, 1831.

It seems to me that the matter would be perfectly clear but for the fact that Bowen L.J., in the course of a general disquisition on the Act in the case of *Hewlett* v. *Allen* (1), made some observations which I think may be put forward as opposed to the view I have expressed, and as suggesting that there is an absolute obligation imposed on the employer by the Act to pay the whole amount of the wages earned, even where he has a set-off against them. But, when one reads these observations with the context, and comes to appreciate the point of view from which they were made, I do not think that the learned Lord Justice really meant to say that it would be a breach of the provisions of the Act to pay only that which might turn out to be payable on account of wages, having regard to a right of set-off possessed by the employer, though, taken apart from the context, his words might be capable of that interpretation. He nowhere in terms deals with the point now in question, and I do not think that it can have been present to his mind, for I perceive that, in summarizing the provisions of s. 3, he makes no reference to the words " or payable to " in the section. He does no doubt use expressions which appear to point to the view that a deduction of a sum from wages by the employer might be contrary to the Act, though the employer would have a right to set off the same amount in a Court in an action for wages against him. But these expressions were not necessary to his decision. He held in the particular case that, though the amounts deducted, which had under an agreement between the plaintiff and her employers been paid to a sick and accident fund, could not by reason of the Truck Acts be treated as lawfully paid, yet the plaintiff was precluded by her acquiescence in such payments from recovering the amount of the deductions. The House of Lords affirmed the decision, but they appear to have entirely negatived the suggestion that such deductions as had taken place constituted any offence against the Act. They held that, the payments having been made to

(1) [1892] 2 Q. B. 662; [1894] A. C. 383.

C. A. 1904

WILLIAMS v. NORTH'S NAVIGATION COLLIERIES (1889), LIMITED.

Collins M.R.

the fund with the assent and at the request of the plaintiff, there had been a legal payment to the plaintiff of the whole amount of her wages, and they in no way seem to have countenanced or indorsed the contention which forms the basis of the plaintiffs' argument in this case. When I scrutinize the passages referred to in the judgment of Bowen L.J., I do not come to the conclusion that he meant to countenance that contention, or that he intended in dealing with the Act to differ in any way from the interpretation put upon it by Lord Denman C.J. in *Chawner* v. *Cummings* (1) I do not think his mind was really addressed to the question whether there was anything in the Act to debar an employer on paying wages to a workman from availing himself of a legal set-off. That being the state of the authorities on the subject, there appears to be no authority really against the construction of the Act which I have endeavoured to express, as being primâ facie the proper construction of it, but on the contrary the authorities appear to be in accordance with it. The result is that it cannot, in my opinion, be said to be an offence against or violation of the statute for the employers to avail themselves on payment of the workmen's wages of a legal set-off such as that sanctioned by the judgment of the magistrates in this case; and, assuming the case to be one in which it would, as a matter of procedure, be proper for us to make a declaration of the kind asked for by the plaintiffs, it appears to me that on the true construction of the Act the plaintiffs are not entitled to the declaration for which they apply. For these reasons I think the appeal should be allowed.

ROMER L.J. read the following judgment:—So far as concerns the relief actually sought in this action the plaintiffs do not dispute that the defendants are entitled to the set-off claimed by them. And in my opinion this is not a case which would justify an injunction being granted as sought by the plaintiffs. Nor is the Court bound to make any declaration as claimed by the plaintiffs. But both parties have asked us to express our views on a question that has been argued, and I proceed, therefore, to give my opinion so far as it appears to

(1) 8 Q. B. 311.

me within my province to do so in the present action. I can give that opinion and my reasons for it very briefly. In my opinion the Act of 1831 did not constitute as a punishable offence the mere non-payment of part of a workman's wages, where the master, who is (apart from any special provisions of the Act) entitled to a set-off in respect of an ordinary debt due to him from the man equal to the amount of wages retained, claims a set-off and a right of retainer in respect of that debt, the debt not being one in respect of goods, wares, or merchandise, a set-off of which is prohibited by s. 5 of the Act. Nor, indeed, can I see that the Act makes a punishable offence any mere non-payment of a man's wages when they fall due, merely because the master had not the means of paying or neglected to pay the same exactly when they became payable. Of course I am only dealing with the Act of 1831, which governs the present case, and am not considering special legislation dealing with a special trade, like the Hosiery Manufacture (Wages) Act, 1874, the provisions of which are significant when compared with the provisions of the Act of 1831. I come to the conclusion I have indicated with regard to the Act of 1831 by a consideration of its clauses taken as a whole, and in particular of ss. 1, 2, 3, 5, and 9, which, in my opinion, ought to be considered together. It appears to me that s. 9 was intended to specify what should be deemed punishable offences under the Act, and that, apart from those offences, if a workman did not obtain payment of his wages, the only remedy contemplated by the Act as available to the man and to enable him to obtain payment is by civil action or proceedings. And even if this were not so, yet, so far as concerns a case where a master does not pay part of the wages, because he has a set-off not invalidated under s. 5, it appears to me, having regard to the provisions of that section, it is not right to hold that the Act, which contemplated an action, suit, or other proceeding being taken by the man for his wages, and only prohibited a special set-off being set up as against him by the master, could have contemplated that it would be a statutory offence for the master to claim at the time when the wages became payable a set-off, which is not prohibited, and

C. A. 1904

WILLIAMS v. NORTH'S NAVIGATION COLLIERIES (1889), LIMITED.

Romer L.J.

which he could effectually set up as against any subsequent civil proceeding by the man to enforce payment. It appears to me that under this Act, if the master sets up, as he may without committing any punishable offence, when the wages become payable, a right to set off such a debt as we are considering in the present case, then the man can do nothing except commence a civil action or other civil proceedings in which the set-off will be a good defence. It follows that in the present case no declaration can be made in favour of the views of the respondents, and that the appeal should be allowed. After what the Master of the Rolls has said I do not think it necessary or useful to refer to the various cases cited before us.

MATHEW L.J. read the following judgment:—The question which we have to determine under the arrangement come to between counsel, to which the Master of the Rolls has referred, is whether the workmen have an absolute right under the Act of 1831 to be paid their wages in cash, or whether the employers may deduct the amount of an admitted set-off and hand the workmen the balance. It was contended for the employers that the Truck Act did not apply. The statute, it was said, did not deal with non-payment. The object of the legislation was not to enforce payment, but to prohibit and to punish payment not in money but in goods. It was argued for the workmen that the Act went much further and was intended to make a failure to pay in current coin an offence for which proceedings of a criminal character might be instituted. It was argued that to dispose of the case the true construction of s. 3 of the Act of 1831 had to be ascertained, and the counsel on each side relied with equal confidence, though not with equal success, upon its provisions.

I am of opinion that the view of the meaning of the section indicated in previous decisions is the correct one—namely, that the statute does not apply to cases of non-payment. The workman who does not receive all that he has earned has the right to enforce payment in the ordinary way, and is not intended to have the right to prosecute his employer for

breach of contract. Any other construction would lead to the unreasonable result that the employers of the workmen specified in the Act would be subject to a serious and vexatious liability not imposed on other employers. The same considerations apply to the question of set-off. There would seem to be no reason why the Legislature should impose on one class of employers a disability to which other employers are not exposed. This action was brought by the workmen to recover the balances alleged to be due to them, and they applied for an injunction to restrain the employers from making any further deduction. The answer of the defendants was that they had a set-off in respect of the wages which were unpaid. This would seem to be an adequate reason for refusing the injunction. But it was argued for the workmen that, although it could not be disputed that there was a set-off, still it was not available at the time when the wages became due. The duty of the employers, it was urged, was to hand over the whole amount and to take steps to enforce their set-off at some future time: in other words, that the statute postponed the employers' right to pay themselves by deducting the amount admitted to be due from the workman. I am unable to adopt this reasoning, and I find nothing in the Act of 1831 or the later statutes to justify this contention. I agree that the appeal must be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Smith, Rundell & Dods, for Walter Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for defendants: *Bell, Brodrick & Gray, for C. W. Kenshole, Aberdare.*

E. L.

C. A.
1904
April 26.

[IN THE COURT OF APPEAL.]

OWENS *v.* CAMPBELL, LIMITED.

Employer and Workman—Compensation—Seaman—Ship moored to Wharf—Use of Wharf by Employer—Employment of Workman not in relation to Use of Wharf—Fireman on Steamer—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

A seaman, employed as fireman on a steamer, was injured by an accident while attending to the boilers. The vessel was a passenger steamer, and was made fast by ropes to a pontoon outside a dock. She was so moored to the pontoon at the time when the accident happened, and for some time previously gangways had been out connecting the vessel with the pontoon to enable passengers to go on board. On an application for compensation under the Workmen's Compensation Act, 1897, an award was made in favour of the applicant. On appeal:—

Held, by Collins M.R. and Romer L.J., Mathew L.J. dissenting, that the employment of the applicant was not an employment having relation to the purposes for which his employers had the use of the pontoon, that his employment was, therefore, not "about" a wharf, and the case did not come within s. 7 of the Act.

APPEAL from a decision of the judge of the Cardiff County Court upon an application for an award of compensation under the Workmen's Compensation Act, 1897.

The case was heard in the county court upon the following agreed statement of facts:—

(1.) The accident in respect of which the claim was made took place on August 21, 1903, on board the steamship *Cambria*. She was a passenger steamboat, which in the summer season made daily trips from Cardiff to Ilfracombe and other places on the Somerset and Devonshire coasts. (2.) The applicant was a fireman in the respondents' employment on board the *Cambria*, and his average weekly earnings were 32*s*. (3.) The *Cambria* came into Cardiff at 7.35 P.M. on the evening before the accident, and was made fast to the landing pontoon which is at the head of the Cardiff Drain and outside the entrance to the docks. The pontoon is a wooden landing stage which rises and falls with the tide, and by means of which the passengers land from and embark on the vessels. (4.) The

Cambria remained afloat from the time that she came in until about 8.30 P.M., when she was left dry on the mud. (5.) She was made fast to the pontoon by ropes, and she continued to be made fast by the same fastenings until she left the pontoon. (6.) The engine fires in the vessel were left in all night, and the applicant, early on the morning of the accident, went on board the vessel to perform his usual duties as a fireman. (7.) The vessel was afloat about 1.30 A.M. on the morning of the day of the accident, and was timed to leave Cardiff for Ilfracombe at 8.15 A.M. (8.) At 8.17 A.M., whilst the applicant was attending to the boilers, a tube in one of the boilers burst, and he was severely scalded on the face and arms. (9.) The gangways from the vessel to the pontoon had been out (that is, connecting the pontoon with the vessel) for some time before the accident happened, and at the time that it happened practically all the passengers going by her were on board the vessel. (10.) The main and auxiliary engines of the vessel had been worked before the accident happened. (11.) The passengers on board the *Cambria* were after the accident transferred to the steamship *Ravenswood*, which left Cardiff at about 8.30 A.M. (12.) It was whilst the *Cambria* was moored to the pontoon for the embarkation of passengers that the accident happened. (13.) The applicant was a seaman on the ship's articles, and engaged on his duties as a seaman at the time of the accident.

The employers denied liability upon the ground that the employment of the applicant was not an employment to which the Act applies.

The county court judge held, upon the authority of *Griffin* v. *Houlder Line, Ld.* (1), that the case fell within the Act, and made an award in favour of the applicant.

The respondents appealed.

1904. April 14. *J. A. Simon*, for the respondents. The applicant was not on or in or about a factory, for the ship was not a factory, nor was it in a factory, though it was close to the pontoon, which may have been a factory. As pointed out by the Master of the Rolls in *Griffin* v. *Houlder Line*,

(1) [1904] 1 K. B. 510.

C. A. 1904

OWENS v. CAMPBELL, LIMITED.

Ld. (1), the applicant must get himself physically into a factory before he can get the benefit of the Act. In order that the applicant should bring himself within the expression "about a factory," mere propinquity to it is not enough; there must be some connection between his employment and the business of the factory, and in this case there was no such connection. [He referred to *Powell* v. *Brown* (2) and *Raine* v. *Jobson*. (3)]

H. Gatehouse (with him *Albert Parsons*), for the applicant. In *Merrill* v. *Wilson, Sons & Co.* (4) the ship, as in the present case, was moored to a quay, and the shipowners were held to be undertakers because they had the use of the quay. So here, the respondents had the use of the pontoon for the purpose of their business, which was that of carrying passengers, and the applicant was employed on that business, and it is not material that he was working below and not either on the deck of the ship or on the wharf. He was doing work on the ship in connection with the user of the wharf by his employers, and therefore comes within the Act; and *Griffin* v. *Houlder Line, Ld.* (5), shews that his being a seaman does not exclude him from the benefit of the Act.

J. A. Simon, in reply.

Cur. adv. vult.

April 26. COLLINS M.R. This is an appeal from a decision of the county court judge of Cardiff. The appeal is by the employers of a workman who was injured, and the county court judge held that the Workmen's Compensation Act, 1897, applied to the case.

The applicant was a fireman employed on a passenger steamer which plied between Cardiff and Ilfracombe and other places. On the occasion in question the vessel had been lying during the previous night at a wharf outside the docks at Cardiff, and was to start in the morning at 8.15 for Ilfracombe. The applicant was a seaman who had signed the ship's articles, and he was engaged on his duties at the time of the accident.

(1) [1904] 1 K. B. 510, at p. 514.
(2) [1899] 1 Q. B. 157.
(3) [1901] A. C. 404.
(4) [1901] 1 K. B. 35.
(5) [1904] 1 K. B. 510.

What he was doing at the time is stated in the judge's notes thus: "The engine fires in the vessel were left in all night, and the applicant, early on the morning of the accident, went on board the vessel to perform his usual duties as a fireman. The vessel was afloat about 1.30 A.M. on the morning of the day of the accident, and was timed to leave Cardiff for Ilfracombe at 8.15 A.M. At 8.17 A.M., whilst the applicant was attending to the boilers, a tube in one of the boilers burst, and he was severely scalded on the face and arms." The man, therefore, was a seaman, and was employed as a seaman at the time of the accident, which arose out of his employment. It was contended before the county court judge on behalf of the employers that they were not liable to pay compensation under the Act because the steamer was not a factory, and the owners were not undertakers within the Act. The judge held that the recent decision of this Court in *Griffin* v. *Houlder Line, Ld.* (1), governed the case before him in favour of the applicant. In that case the ship was in a dock, and a seaman belonging to her was employed, as part of his ordinary duty, in clearing out a hold for the reception of cargo, and he met with an accident while so employed which resulted in his death. A majority of this Court decided, on the authority of *Raine* v. *Jobson* (2), that the fact that the deceased was a seaman did not exclude him from the operation of the Act, and that the case fell within its provisions. No doubt in that case the workman was physically in a factory, for a dock is a factory, and the ship was within the dock, and the question is whether that decision governs the present case, in which neither the ship nor the man was in a dock. The ship in this case was lying alongside and was using a wharf which for certain purposes is a factory, and so far as the employers were using the wharf for purposes for which it was designed they might be undertakers, as having the actual use and occupation. The question is, under these circumstances, how far the applicant is entitled to relief under the Act. The answer to that question depends upon s. 7 of the Act, which enacts that "this Act

(1) [1904] 1 K. B. 510. (2) [1901] A. C. 404.

C. A. 1904

OWENS v. CAMPBELL, LIMITED.

Collins M.R.

shall apply only to employment by the undertakers as hereinafter defined on or in or about a factory," and a wharf for this purpose is a factory. The applicant, therefore, has to shew that he was employed by the undertakers on or in or about the wharf, and that seems to me to be the material question in this case. Can it be said that this man, who was discharging his ordinary duties as a fireman, was employed on or in or about this wharf? Clearly he was not employed on or in it; so that the question comes to this—Was he employed about the wharf? The clause has been frequently before this Court, and it is pretty well settled that the word "about," as used in s. 7, carries with it the idea of physical proximity; but it also involves the idea of an employment connected with the business carried on at the place indicated. If and so far as the applicant was employed in relation to the purposes for which his employers had the use of the wharf, I think he could be said to be employed about it; but, in order to ascertain the rights of the parties, it is necessary to bear in mind that we are dealing with what may be called "constructive factories." We have to look to the nature of the factory and the character of the workman's employment, and the mere fact that he was employed by the undertakers in juxtaposition to a factory in the occupation of his employers does not make his employment one that is "about" the factory. To take an example: suppose that a coachman comes to a factory to drive the occupier, who is his master, home, and at a distance of, say, fifty yards from the factory the coachman meets with an accident. The man would be in the employment of the occupier of the factory, and he would be near it, but his employment could not be said to be on or in or about the factory, because it was not concerned in any way with the business of the factory. There must be a line, though perhaps a very fine one, between cases that are within and those that are without the Act, and this case, I think, falls outside the Act. The applicant was a seaman discharging the ordinary duties of a seaman, and those duties had no connection with the use by his employers of the wharf. It seems to

me that the county court judge was wrong in treating this case as within the decision in *Griffin* v. *Houlder Line, Ld.* (1) Upon the facts of this case it is clear the ship was not in a dock; and in my judgment the employment of the applicant was not on or in or about a wharf. I have come, therefore, to the conclusion that the appeal should be allowed.

ROMER L.J. read the following judgment:—I am of the same opinion. It is admitted that the landing stage is a "factory" within the Act. But by the steamer being moored alongside, and using the stage for the purposes of passengers and goods being taken into and from the ship, it did not become part of the wharf, or become itself as a whole a "factory." Nor, in my opinion, did every man upon and employed in the service of the ship become by the circumstances above referred to at once and of necessity employed on, in, or about a factory. No doubt a man ordinarily employed on a ship may, by the particular work he has to do while the ship is moored, be employed on, in, or about the landing stage, and so come within the Act. But whether he is so employed must depend on the special circumstances of his employment. I can only say that in the circumstances of the present case, which the Master of the Rolls has stated, and which are not in dispute, I come to the conclusion that the man was not employed on, in, or about the landing stage, and so is not within the Act. I gather that the point on which we are deciding this case was not sufficiently brought to the attention of the learned county court judge; but the point is open to the appellants, and I think, therefore, that the appeal succeeds.

MATHEW L.J. read the following judgment:—I regret to be unable to agree with the opinions of the Master of the Rolls and Romer L.J.; but it seems to me that the grounds upon which we are asked to allow the appeal are less satisfactory than the reasons for its dismissal. If the accident had occurred while the applicant was employed on a vessel moored to a wharf in a dock, he would be entitled to the protection of the

(1) [1904] 1 K. B. 510.

C. A. 1904

OWENS v. CAMPBELL, LIMITED.

Mathew L.J.

Workmen's Compensation Act, 1897, for the dock would be a factory within the meaning of the Workmen's Compensation Act, 1897, and the Factory and Workshop Act, 1901, and the applicant in the course of his employment would be "on or in or about" the factory: see *Raine* v. *Jobson & Co.* (1) and *Griffin* v. *Houlder Line, Ld.* (2) But, because the *Cambria* was moored to a wharf outside a dock, it was argued that the employment of the workman was one to which the Act did not apply. The wharf, it was agreed, was a factory, but it was said that, though he might be protected while passing near to and over the wharf to the steamer, he lost the benefit of the Act when he reached the deck of the steamer. From that time, it was argued, he could not be said to be working in or on the wharf, and was therefore outside the Act. It would follow that a workman going to the ship, by the only approach to the wharf, to do some necessary repairs, and sustaining an injury when close to the wharf on the shore side, would have no claim for compensation. It appears from the evidence that the applicant's employers had, for the purposes of their business as owners of the *Cambria*, the actual use and occupation of the wharf within the meaning of the Act of 1901, s. 104. The vessel made daily trips from Cardiff to places on the neighbouring coast and back. On arriving at Cardiff she was brought under steam to the wharf and placed in her berth. She was fastened by ropes to the wharf, and remained fastened until her next voyage. Passengers coming on board and leaving passed over the wharf. Early in the morning of the accident the applicant came on board to attend to his ordinary duties as fireman. Steam was got up and the main and auxiliary engines were worked. At 8.17 the passengers were all on board and the steamer was on the point of departure. The applicant was standing by the boilers when a tube burst and he was badly scalded. In my view the evidence shews that the appellants could not have made the wharf available for their business without the assistance of such a workman as the applicant. He was on the steamer for a purpose directly connected with their use of the wharf, and I have come to the

(1) [1901] A. C. 404. (2) [1904] 1 K. B. 510.

conclusion that in the course of his employment he was at the time of the accident "about" the wharf within the meaning of s. 7 of the Act of 1897. If, as was assumed upon the argument of this point, the employment of the fireman was one to which the Act applied, the general intention of the Legislature must be admitted to be that there should be a right to compensation. The language of s. 7 seems to me to permit effect to be given to the intention in the case of the applicant. I find nothing in the Act to suggest that the Legislature meant to distinguish between the rights of workmen of the same class, or to shew that while workman A. was within the Act, workman B., under similar, if not the same, circumstances, was intended to be left unprotected. I therefore come to the conclusion that the appeal on this point fails.

Appeal allowed.

Solicitors for applicant: *Smith, Rundell & Dods, for Meyrick & Davies, Cardiff.*

Solicitors for respondents: *Steadman, Van Praagh & Gaylor, for W. H. Brown, Bristol.*

A. M.

C. A.
1904
March 18.

[IN THE COURT OF APPEAL.]

In re BURNAND.
Ex parte BAKER, SUTTON & CO.

Bankruptcy—Underwriter at Lloyd's—Business carried on by Underwriter on behalf of Himself and "Names"—Bankruptcy of Underwriter—Right of Trustee to Books of Account.

An underwriter at Lloyd's carried on an underwriting business on behalf of himself and also on behalf of five other persons, called his "names." An agreement was entered into between him and each "name," by which it was stipulated that proper underwriting and account books should be provided and kept in the usual manner, and should at all times be open to the inspection of the "name." The "name" was to pay to the underwriter a fixed sum per annum as a remuneration for his services in conducting the business, keeping and providing books and papers, and for providing a proper office and clerical assistants, &c.

The underwriter in fact kept books of account relating to the transactions in which he was jointly interested with the "names" or any of them, there being in the books six parallel columns, one for each "name," and one for the underwriter himself.

The underwriter became bankrupt, the books being at this time in the possession of accountants :—

Held, that the "names" had a joint property in the books with the bankrupt, and that the trustee in the bankruptcy was not entitled to have the books delivered up to him, but that the "names" must undertake to give to the trustee reasonable facilities for inspecting the books.

Decision of Buckley J. reversed.

Prior to his bankruptcy P. G. C. Burnand, who was an underwriter at Lloyd's, carried on business in the usual way on his own account and also on behalf of five other persons, called his "names." A separate agreement with regard to the business was entered into between Burnand and each of the "names."

One of the agreements (which may be taken as a specimen) was dated February 9, 1892, and was made between R. J. Elwell and Burnand. It provided that—

(1.) Burnand "shall, until January 1, 1893, and for such longer period as is hereinafter mentioned, determinable as

hereafter provided, act as the agent of the said R. J. Elwell for the purposes of underwriting policies of insurance at Lloyd's, and carrying on the ordinary business of an underwriter at Lloyd's, and upon the terms and conditions hereinafter contained.

"(2.) The said P. G. C. Burnand shall during the said period have the sole management of the underwriting, and all risks shall be taken and all losses, averages, and returns shall be settled by him in the name and on the account of the said R. J. Elwell, and in accordance with the usual custom of Lloyd's. The said P. G. C. Burnand shall devote sufficient time and attention to the business for the proper management and transaction thereof.

"(3.) For the purpose of providing funds for the service of the underwriting business, the said R. J. Elwell shall forthwith open a banking account in his name with Messrs. Barclay, Bevan & Co., or with such other bank as he may from time to time determine, and shall place to the credit of such account a sum sufficient for carrying on the said business. All premiums and other moneys received in respect of the underwriting business shall be paid into such account, and all claims, losses, returns, and other payments and outgoings which may become due and payable in respect of the said business shall be paid out of the said account, or by the said R. J. Elwell should the account at any time prove insufficient. All cheques on the said account shall be drawn by the said P. G. C. Burnand, and the said R. J. Elwell agrees to give the said P. G. C. Burnand during the continuance of the agreement full power and authority to draw cheques in the name of the said R. J. Elwell upon the said banking account. The said account shall be devoted solely to the purposes of the underwriting business, and no moneys, except profits ascertained as hereinafter mentioned, and except any excess in capital as mentioned in clause 4, shall be drawn from such account except for the purposes of the said business, but, subject hereto and to the requirements of the business, the said banking account shall be the exclusive property of the said R. J. Elwell, and may be dealt with by him on the termination of the agency and after

C. A. 1904

BURNAND, *In re.* BAKER, SUTTON & Co., *Ex parte.*

the final winding-up of the accounts thereof as he may think proper."

"(5.) Proper underwriting and account books shall be provided and kept in the usual manner, and shall at all times be open to the inspection of the said R. J. Elwell or his agent thereunto appointed in writing, and the said P. G. C. Burnand shall at all times give to the said R. J. Elwell such information or explanations as to the books or the state of the account as he may require. The said books and accounts, if required by the said R. J. Elwell, shall be periodically audited by a professional accountant, and the expense of such audit shall be an outgoing within art. 3 hereof.

"(6.) The said R. J. Elwell, so long as the underwriting is carried on under this agreement, shall pay to the said P. G. C. Burnand, while he shall duly perform the engagements on his part herein contained, as a remuneration for his services in conducting the said underwriting business, for keeping and providing books and papers, and for providing a proper office and clerical assistants and all other outgoings and expenses connected with the underwriting business, save and except the said R. J. Elwell's annual subscription to Lloyd's and the expenses of auditing the accounts in accordance with art. 5 hereof, the sum of 260*l.* per annum, which sum shall be payable quarterly and treated as outgoings of the said business. The said R. J. Elwell shall also pay to the said P. G. C. Burnand in respect of the underwriting of each year during the continuance of the underwriting as remuneration for his services in conducting the same such a commission or further sum as shall be equal to 20 per cent. of the net gains or profits (if any) of each year, to be ascertained and paid in manner hereinafter mentioned.

"(7.) Nothing in this agreement contained or in the business to be carried on thereunder shall constitute a partnership between the parties hereto."

Burnand in fact kept a book or books in which were entered all the transactions in which he was jointly interested with the "names" or any of them, there being six parallel columns, one for himself and one for each of the "names." As regarded

transactions in which he alone was interested he kept separate books.

In March, 1903, the debtor resigned his membership of Lloyd's. In September, 1903, he was adjudicated a bankrupt, and the trustee in the bankruptcy claimed that the books of account of the underwriting business, which were in the possession of Messrs. Baker, Sutton & Co., accountants, should be delivered up to him as being part of the property of the bankrupt, and offered that they should be open to inspection by the "names" at all reasonable times. The accountants declined to deliver up the books, on the ground that they were the joint property of the debtor and his "names." The trustee thereupon applied to the Court for an order on the accountants to deliver up the books to him. An affidavit was made by John Baker, a partner in the firm of Baker, Sutton & Co., in which he said: "The underwriting books kept by the debtor on behalf of himself and his 'names' are in the possession of my firm, and were taken over by me from the debtor on March 19, 1903, to hold on behalf of the debtor and his 'names,' under an arrangement come to between the debtor and the 'names' at or about the time when the debtor resigned his membership at Lloyd's with a view to my firm working on the said books as accountants for the 'names' whose membership of Lloyd's continued after the debtor's resignation." In answer to this Burnand made an affidavit in which he said: "It is not the fact that I made any arrangement whatever for the said books to be handed over to the said John Baker's firm, except that, as I was giving up my office, I was willing for the time that the books should be placed in the hands of Baker's firm for safe custody, and for him to make such investigation as he wished into them on behalf of the 'names.'"

March 8. *S. G. Lushington*, for the trustee.
Muir Mackenzie, for the accountants.

BUCKLEY J. The respondents to this application have no property in the books in question, nor do they assert any right

C. A. 1904

BURNAND, *In re.* BAKER, SUTTON & Co., *Ex parte.*

Buckley J.

of property in them, but they set up a jus tertii. They say that the books are the joint property of the debtor and his "names," and that although they themselves have no property in them, nevertheless the debtor is not entitled to the books because the "names" have a joint property in them. But the respondents have no right to retain the books against any one who has the property in them, and the case could be disposed of on that short ground. There is, however, the broader proposition whether, if the debtor had not become bankrupt, the "names" could have demanded the books from him. I think they could not. The question depends on the written contracts with the "names." The contracts are very similar in their terms. Taking Elwell's contract (one of the "names") as an example, it provides (clause 5) that proper underwriting and account books shall be provided and kept in the usual manner, and shall at all times be open to the inspection of Elwell or his agent thereunto appointed in writing, and the debtor shall at all times give Elwell such information or explanations as to the books or the state of accounts as he may require. There seems to be no object in providing by the contract that Elwell is to have the right of access to and inspection of the books if they are his own property. Then clause 6 of the contract provides that the debtor is to be paid a certain sum annually for his services in conducting the underwriting business, for keeping and providing books and papers, and for providing a proper office and clerical assistance. The books shew in columns the sums receivable and the sums payable by the debtor and his "names." They in fact record the transactions of five or six persons in respect of which they are severally liable. The books are not the property of any one of them as against the other, nor can any one of them claim them as against the other. Then who has the property in the books? It seems to me that the debtor has. He is responsible for keeping the books, and they are his books as between himself and the other parties. There must be an order for delivery up of the books to the trustee.

H. L. F.

The accountants appealed.

March 18. *Montague Lush*, *K.C.*, and *Muir Mackenzie*, for the appellants. It is submitted that if Burnand had relinquished the business without becoming a bankrupt he could not have retained the books as against the "names." They had paid for the books, and at the most Burnand had a joint property with them in the books. If there had been a partnership the solvent partners would have been entitled to the books. But Burnand was really only a manager of the business for the "names." He made contracts between the "names" and persons who effected assurances, and the books were kept to record those transactions; not, as Buckley J. seems to have thought, to record transactions between Burnand and the "names." If I pay an agent to keep my books for recording my business transactions carried on by him as my agent, how can he be entitled to retain the books as against me?

Scrutton, *K.C.*, and *S. G. Lushington*, for the trustee. The books contain entries of Burnand's own transactions as an underwriter, as well as those of the "names." No doubt it is the duty of an agent at common law to keep an account of his transactions on behalf of his principal and to communicate the contents to the principal. But primâ facie the account is the property of the agent, though the principal has a right to know the contents. The determination of the agency cannot make any difference.

[VAUGHAN WILLIAMS L.J. Primâ facie the man who pays for the books is entitled to them.]

It is reasonable that the agent should be entitled to the books for his own protection: *Tipping* v. *Clark*. (1) Here the agent had as much property in the books as the principals, because his own transactions are entered in them. There is evidence that he paid for the books in part. The books were kept according to the custom of Lloyd's.

[VAUGHAN WILLIAMS L.J. We have no evidence of that custom.]

Montague Lush, *K.C.*, in reply. Even if Burnand had an equal right to the books with the names, he had no exclusive right to them.

(1) (1843) 2 Hare, 383; 62 R. R. 144.

C. A. 1904

BURNAND, *In re.* BAKER, SUTTON & Co., *Ex parte.*

VAUGHAN WILLIAMS L.J. In my opinion the appeal ought to be allowed. As regards the arrangements which were entered into, so far as I can judge from the agreements themselves, I feel great doubt whether it was ever intended that there should be one ledger kept for all the five "names." I think that under these agreements what was really intended was this—that each of the "names" should pay a lump sum to cover the expenses—amongst others the expense of the books and papers—incurred on behalf of that one "name." If that had been carried out, the necessary result I suppose would have been that, whatever right of retention of the books Burnand might have had during the continuance of the agency, as soon as the agency came to an end each one of the "names" would have been entitled to his own book. But that is not the system which was actually adopted. In fact a common book was kept with five columns, one for each of the five "names," and the first, making the sixth column, for the purpose of entering transactions of Burnand in respect of those matters in which the "names" were interested, Burnand keeping separate books for his own separate transactions as an underwriter. In my opinion the proper inference to be drawn from this is that the "names" in fact knew of and acquiesced in the accounts being kept in that way. But, whatever may be the proper inference to draw from that, the most favourable possible inference to Burnand or his trustee would be that the six—that is, Burnand plus the five "names"—had a joint interest and a joint property in these books. Burnand's agency having now come to an end, he can have no greater right to the books than the other five. The other five, through their accountants, are in possession and have the control of the books. In my opinion an order ought not to be made at the instance of Burnand, who has the joint property in the books with the five, that he, or his trustee who represents him, should have exclusive possession of the books, but I think they should be retained by the accountants.

But it is, I think, manifestly right that the trustee in the bankruptcy should have inspection of the books and facilities for extracting from them what he requires, and I understand

that Mr. Lush is willing that he should have those facilities. Under these circumstances I think it is enough to say that the order of the learned judge must be discharged, Mr. Lush undertaking on behalf of the other five gentlemen that such inspection of the books shall be given to the trustee as may be reasonably required by him. The appeal must be allowed, with costs.

STIRLING L.J. I am of the same opinion. Burnand, who carried on business as an underwriter, entered into five separate agreements with five gentlemen, called his "names," under each of which he was to carry on a separate business for the benefit of the "name" with whom he contracted by that agreement. I will take as an example, as Buckley J. did, the agreement between Burnand and Elwell of February 9, 1892. [The Lord Justice stated the effect of the agreement, and continued:—]

Elwell is the owner of the business. He under clause 3 provides all the money for carrying it on; all the money which Burnand receives in respect of the transactions is to be paid into the banking account, and all the expenses are to come out of that account. The business is Elwell's and Elwell's alone. It seems to me that, if the agreement were strictly carried out, in the absence of evidence that any particular manner of keeping the books is recognised at Lloyd's, the books should be kept in the proper and usual course of business. The proper course, as it seems to me, was that Burnand should provide separate books in which Elwell's transactions should be recorded, and that the books, being paid for by Elwell and relating to Elwell's business, should be Elwell's property. If that were the real state of things, I think that after the agreement had come to an end Burnand would have no right to retain the books because they were Elwell's and not Burnand's books. If Burnand for his own protection desired to keep books relating to the dealings between himself and Elwell, he ought to keep those books separately just as he would keep his own transactions separate. But the transactions in the business which he carried on on behalf of Elwell with outsiders were Elwell's transactions, and

C. A. 1904

BURNAND, *In re.* BAKER, SUTTON & Co., *Ex parte.*

Stirling L.J.

the books in which they were recorded ought to belong to Elwell.

However, that is not what was actually done. One set of books was in fact kept as regards all the transactions into which these six gentlemen, Burnand and the five "names," entered, and entries were made of all those transactions in these books. As regards transactions into which Burnand entered separately, a separate set of books were kept. Those were his books, and they have been handed over to the trustee in his bankruptcy. But as regards the books in which the joint transactions are recorded, they do not strictly satisfy the requirements of the agreements. What is the result? It seems to me that at the most Burnand had a joint interest in the books with the five "names" with whom he entered into these agreements. They must be taken to have been well aware of the mode in which the entries were made, the business having been carried on for a long time in this way.

I think that in these circumstances Burnand cannot be held to have a claim which overrides that of the five others, all of whom are jointly interested in the books. I cannot, therefore, agree with the decision of Buckley J. that the books ought to be handed over to Burnand's trustee. At the same time, having regard to what has happened, it seems to me that each of the five gentlemen has recognised to a certain extent the interest of Burnand in the books, because they must be taken to have known that he has kept his own transactions in them, and, although the books are to remain in the possession of the five, access to the books ought to be given to Burnand's trustee at all reasonable times and for all proper purposes.

COZENS-HARDY L.J. I am of the same opinion, and I have really very little to add. In the Court below the objection was taken that Baker & Co. could not rely on a jus tertii—that is, the right of the five "names." That objection has not been relied upon here, and the question has been treated, as in fact it is, as one between Burnand's trustee on the one hand and the five "names" on the other. For the reasons which have been given by my learned brethren, I can see no ground for

requiring the five to give up the books to Burnand's trustee, who at the utmost is only jointly interested with the other five. But I think the undertaking which has been offered by Mr. Lush should be given by the five "names" and not by the accountants, who, of course, might be discharged at any moment. Mr. Lush and Mr. Muir Mackenzie can, I understand, appear for the five "names."

C. A. 1904

BURNAND, *In re.* BAKER, SUTTON & Co., *Ex parte.*

Appeal allowed.

Solicitors: *Ward, Bowie & Co.; Parker, Garrett & Co.*

W. L. C.

[IN THE COURT OF APPEAL.]

C. A. 1904 *April* 14.

THE CHELSEA WATERWORKS COMPANY *v.* THE METROPOLITAN WATER BOARD.

Waterworks Company—Division of Profits — Issue of Preference Shares—Absence of "Prescribed Rate" in Special Act—Rate of Interest fixed by Company—Effect of Incorporation of s. 13 *of Companies Clauses Act*, 1863—*Limitation of Profits divisible among Ordinary Shareholders—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 2, 75—*Companies Clauses Act*, 1863 (26 & 27 *Vict. c.* 118), *s.* 13.

A waterworks company was formed under a special Act which incorporated the Waterworks Clauses Act, 1847. Under subsequent special Acts which incorporated the Companies Clauses Act, 1863, the company issued preference stock at 5 per cent. and 4½ per cent. respectively. None of the company's Acts contained a prescribed rate for the division of profits among the undertakers. On a special case stated by the Court of Arbitration appointed under the Metropolis Water Act, 1902:—

Held, that, by virtue of s. 13 of the Companies Clauses Act, 1863, the rates of interest fixed by the company on the preference stock issued by them were "prescribed rates," and that the whole of the paid-up capital being subject to prescribed rates of interest the company, by s. 75 of the Waterworks Clauses Act, 1847, were only entitled to divide as maximum dividends 10 per cent. per annum on the ordinary stock.

APPEAL upon an award, stated by the Court of Arbitration appointed under the Metropolis Water Act, 1902, in the form of a special case, for the determination by the Court of Appeal of a question of law arising in the course of the arbitration.

Paragraph 3 of the award, which stated the point raised in

C. A. 1904

CHELSEA WATERWORKS COMPANY v. METROPOLITAN WATER BOARD.

the appeal, was as follows: "During the hearing of the said matter it appeared that the total capital of the Chelsea Company in shares and stock created, issued, and paid up consists of the following items—viz., 782,322*l.* ordinary stock; 150,000*l.* 5 per cent. preference stock; 160,000*l.* 4½ per cent. preference stock; 643*l.* 4½ per cent. convertible preference stock; making in all 1,092,965*l.* On this state of facts a question of law arose on which we held that, on the true construction of the Chelsea Company's Acts, 1852, 1864, and 1875, and the Waterworks Clauses Act, 1847, and the Companies Clauses Act, 1863, the rates of 5 per cent. and 4½ per cent. on the above-mentioned 5 per cent. preference stock and 4½ per cent. preference stock (other than the above-named 4½ per cent. convertible preference stock) are the prescribed rates on those stocks respectively, and that the company are entitled to divide as maximum dividends the sums of 10 per cent. on the sums of 782,322*l.* ordinary stock and 643*l.* 4½ per cent. convertible preference stock, of 5 per cent. on the sum of 150,000*l.* 5 per cent. preference stock, and of 4½ per cent. on the sum of 160,000*l.* 4½ per cent. preference stock, and no more."

Sect. 75 of the Waterworks Clauses Act, 1847, the marginal note of which is "profits of the company to be limited," is as follows: "The profits of the undertaking to be divided among the undertakers in any year shall not exceed the prescribed rate, or where no rate is prescribed they shall not exceed the rate of ten pounds in the hundred by the year on the paid-up capital in the undertaking, which in such case shall be deemed the prescribed rate, unless a larger dividend be at any time necessary to make up the deficiency of any previous dividend which shall have fallen short of the said yearly rate." By s. 2, "the expression 'the special Act' used in this Act shall be construed to mean any Act which shall be hereafter passed authorizing the construction of waterworks, and with which this Act shall be incorporated; and the word 'prescribed' used in this Act in reference to any matter herein stated shall be construed to refer to such matter as the same shall be prescribed or provided for in the special Act, and the sentence in which such word occurs shall be construed as if, instead of

the word 'prescribed,' the expression 'prescribed for that purpose in the special Act' had been used."

In 1852 the Chelsea Waterworks Company obtained statutory powers under the Chelsea Waterworks Act, 1852 (15 & 16 Vict. c. clvi.), which incorporated certain provisions, including s. 75, of the Waterworks Clauses Act, 1847. Under the Act the capital was divided into ordinary shares and no rate of interest was prescribed, and the company had power to issue shares to the authorized amount, which was done. By the Companies Clauses Act, 1863, Part II., which deals with additional capital, it is enacted by s. 13 with regard to any company incorporated either before or after the passing of the Act, "where any such company is authorized by any special Act hereinafter passed and incorporating this part of this Act to raise any additional sum or sums by the issue of new preference stock, then in every such case the company may from time to time create and issue such new stock, with any fixed, fluctuating, contingent, preferential, perpetual, terminable, deferred, or other dividend or interest, not exceeding the rate prescribed in the special Act, and if no rate is prescribed, then not exceeding the rate of five pounds per centum per annum. . . ."

By the Chelsea Waterworks Act, 1864 (27 & 28 Vict. c. xxxix.), Part II. of the Companies Clauses Act, 1863, was incorporated in the Act. Sect. 8 empowered the company to raise, by way of additional capital, any sum not exceeding 285,000*l.* by the issue of new preference stock. Under this Act the company issued 150,000*l.* 5 per cent. preference stock.

By the Chelsea Waterworks Act, 1875 (38 & 39 Vict. c. cviii.), Part II. of the Companies Clauses Act, 1863, and, with respect to the amount of profit to be received by the undertakers, the Waterworks Clauses Act, 1847, were incorporated with the Act, and the company were empowered to raise, by the creation and issue of new shares or new stock, whether preferential or ordinary, or both, any further sums not exceeding in the whole 160,000*l.* Under this Act the company issued 160,000*l.* 4½ per cent. preference stock.

Sir Edward Fry, in delivering the judgment of the Court of

D

C. A. 1904

CHELSEA WATERWORKS COMPANY v. METROPOLITAN WATER BOARD.

Arbitration, held that the expression "the paid-up capital in the undertaking" in s. 75 of the Waterworks Clauses Act, 1847, was not confined to the ordinary share capital, but included also the preference stock. As to the question whether a rate had been prescribed as to the whole of the paid-up capital of the company, he held that the definition of "prescribed" in s. 2 of the statute shewed that by "prescribed rate" was meant a rate prescribed by statute. He pointed out that in the special Acts of the company of 1864 and 1875 no rate was prescribed, but that those Acts incorporated s. 13 of the Companies Clauses Act, 1863, and continued: "Sect. 13 provides for a rate 'if no rate is prescribed then not exceeding the rate of five pounds per centum per annum.' In our opinion that is a prescription of a rate. It is a prescription by statute—a limitation by statute of the right to receive more than 5 per cent. or such less sum as the company might determine. With regard to the 5 per cent. preference stock, therefore, we hold that that clause applies, and that no more than 5 per cent. can be deemed to be the prescribed amount. With regard to the 4½ per cent. preference stock, the question is not quite so clear, but in our judgment the same conclusion must be arrived at, and for this reason, that what was prescribed was a rate not exceeding 5*l.* per cent. per annum. That seems to delegate to the company the right of prescribing something less than 5 per cent. Therefore we think that the 4½ per cent. must be taken as that amount, and that there is a right to receive only 10 per cent. on the ordinary capital and 5 per cent. and 4½ per cent. respectively on the two classes of preferential capital."

The company appealed.

Sir E. Clarke, K.C., and *Haldane, K.C.* (*Boyle, K.C.*, and *Boydell Houghton*, with them), in support of the appeal. The restriction on the distribution of profits in s. 75 of the Waterworks Clauses Act, 1847, is to 10 per cent. on the whole capital of the undertaking; but the decision of the Court of Arbitration imposes a further restriction by eliminating the preference stock from the sum on which 10 per cent. is divisible. There are no prescribed rates in any of the company's Acts, so that the

only prescribed rate is the 10 per cent. under the Waterworks Clauses Act, 1847, and that percentage is distributable among the corporators. The manner in which it is distributed merely concerns the shareholders, and is a matter which must be settled between them. In this case the arrangement is that some of them are to receive 5 and some 4½ per cent., and it follows that those shareholders upon whom there is no such restriction are entitled to divide the surplus rateably. The Companies Clauses Act, 1863, which applies to all sorts of companies, could not have been intended to cut down the rights of shareholders in water companies conferred by statute. Even if it could be held that, in the case of the preference stock issued under the statute of 1864, 5 per cent. is a prescribed rate by reason of s. 13 of the Companies Clauses Act, 1863, the same cannot be said of the 4½ per cent. payable on the stock issued under the statute of 1875, for that is a rate fixed by agreement between the company and the persons to whom the stock is issued.

Fletcher Moulton, K.C. (with him *J. D. Fitzgerald, K.C.*, and *A. B. Shaw*), was not called on.

COLLINS M.R. This is an appeal from a decision of the Court of Arbitration appointed under the Metropolis Water Act, 1902, the reasons for which are stated in a judgment of Sir Edward Fry.

The point raised really comes to this: whether on the true construction of s. 75 of the Waterworks Clauses Act, 1847, the Chelsea Waterworks Company are entitled to distribute among their ordinary shareholders, in the shape of back dividends, certain sums of money, with the result that the shareholders would receive a sum larger than 10 per cent. upon the ordinary share capital. That section enacts that the profits of the undertaking to be divided among the undertakers in any year shall not exceed the prescribed rate, or where no rate is prescribed they shall not exceed the rate of ten pounds in the hundred on the paid-up capital in the undertaking, but provision is made for making up deficiencies of previous dividends. By s. 2 of the Act the word "prescribed" used in reference to

C. A. 1904

CHELSEA WATERWORKS COMPANY v. METROPOLITAN WATER BOARD.

Collins M.R.

any matter is to be construed to refer to that matter "as the same shall be prescribed or provided for in the special Act," and the expression "the special Act" is to mean any Act thereafter passed, authorizing the construction of waterworks, with which the Waterworks Clauses Act is incorporated. This general Act is incorporated in the special Act of the company of 1852, in which there is no prescribed rate mentioned, and it follows that 10 per cent. is to be deemed to be the rate prescribed in that Act. Part of the capital of the company was raised under subsequent Acts, and consists of preference stock, some with interest at 5 per cent. and some at 4½ per cent. It is contended on behalf of the company that the only "prescribed rate" in respect of their capital is the 10 per cent. which is to be deemed to be prescribed, and that if it can be shewn that 10 per cent. on the whole capital of the company has not been paid, then, notwithstanding that some of the shareholders are limited to 5 per cent. and some to 4½, any sum available for distribution up to 10 per cent. on the whole capital should be distributed among the shareholders who are not limited to receiving 5 or 4½ per cent. Whether this is so or not depends on the question whether those rates of 5 and 4½ per cent. are prescribed rates. It seems to me that Sir Edward Fry has correctly arrived at the conclusion that there is a prescribed rate in respect of each of the classes of contributors to the paid-up capital of the company. With regard to the ordinary shareholders, there is a "prescribed rate" which is 10 per cent. by reason of default of mention of a prescribed rate in the special Act. The same conclusion is arrived at with regard to the preference shareholders upon consideration of the special Acts under which the preference stock was issued. With regard to both issues, the special Acts of the company of the years 1864 and 1875 incorporated Part II. of the Companies Clauses Act, 1863, which relates, among other things, to the issue of new preference stock, and in s. 13 limits the interest to the rate prescribed in the special Act, and if no rate is prescribed, then to a rate not exceeding 5 per cent. per annum. The Acts or parts of Acts incorporated must be read as if they were parts of the Act with which they are incor-

porated. There is thus upon the face of the company's statute of 1864 a limit of 5 per cent. per annum, which thereupon becomes the prescribed rate. The rate of 4½ per cent. fixed in the Act of 1875 is below the maximum mentioned in the Companies Clauses Act, 1863, but the argument as to there being a prescribed rate is equally conclusive in this case as in the former one. The Legislature has given to the company a statutory power to determine the rate of interest upon the preferred stock, and the exercise of that statutory power creates a prescribed rate of interest. There is, therefore, a prescribed rate of interest in respect of each class of the paid-up capital of the company; and when once that conclusion is arrived at it is clear that the company have no right to distribute to their shareholders anything over and above the prescribed rate of interest applicable to their holdings.

It appears to me that the judgment given by Sir Edward Fry was perfectly right, and that this appeal fails.

ROMER L.J. I agree, and have nothing to add.

MATHEW L.J. I am of the same opinion. I will only deal with the last point made, which was that the 4½ per cent. preference stock stands on a different footing from the 5 per cent. stock. Looking at s. 13 of the Companies Clauses Act, 1863, it is not possible to doubt that if the company had raised all the preference stock at 5 per cent. that would have been the prescribed rate for the whole. But the statute gives them full power to fix the rate up to the maximum mentioned, and where there is no rate prescribed by the special Act the prescribed rate is that fixed by the company within the limits to which they are restricted.

Appeal dismissed.

Solicitors for company: *Hollams, Son, Coward & Hawksley.*

Solicitors for Water Board: *Linklater, Addison, Brown & Jones.*

A. M.

C. A.
1904
March 12.

[IN THE COURT OF APPEAL.]

THE KING *v.* PINCKNEY.

Habeas Corpus—Jurisdiction to order Issue of Writ—Writ to Person out of Jurisdiction at date of Order.

There is no power in the Court or a judge to order the issue of a writ of habeas corpus directed to a person who at the date of the order is out of the jurisdiction.

APPEAL from a decision of a Divisional Court affirming an order of Walton J. at chambers for the issue of a writ of habeas corpus under the following circumstances.

In 1899 the respondent, P. J. Pinckney, an Englishman residing in the Argentine Republic, was married there to the appellant, E. J. Pinckney. There were matrimonial differences between the parties, and in August, 1901, Mrs. Pinckney came to England to her mother's house, apparently with the consent of her husband, bringing the only child of the marriage with her. On October 20, 1902, the husband arrived in England, and demanded the custody of the child; this was refused, and on the following day the wife went with the child to France, where they had both since remained. On October 31, 1902, a summons was taken out at chambers on the application of the husband calling upon the wife to shew cause why a writ of habeas corpus should not issue directing her to bring up the body of the child; this summons was heard on several occasions, and on July 22, 1903, Walton J. ordered that, upon Mrs. Pinckney undertaking to allow her husband to have access to the child, and for that purpose to bring the child back to England forthwith, and upon Mr. Pinckney undertaking not to remove the child from the custody of its mother, there should be no order, except liberty to apply; and he further ordered that if the undertaking were not given by Mrs. Pinckney within a week a writ of habeas corpus should issue against her. The summons was accordingly adjourned to July 29, 1903, on which day, the undertaking not having been given by Mrs. Pinckney, Walton J. ordered a writ of habeas

corpus to issue; this order was not drawn up, but a writ of habeas corpus was issued on the same day, and the usual notice required for service with a writ of habeas corpus was signed by the husband's solicitors requiring Mrs. Pinckney to bring up the child at chambers on August 5, 1903, and make a return to the writ. On August 5, the return day, it was brought to the knowledge of Walton J. that Mrs. Pinckney, as well as the child, was then and had been at the date of the order out of the jurisdiction, and the learned judge ordered that the writ of habeas corpus already issued should be quashed, and instead thereof that the prosecutor (Mr. Pinckney) "be at liberty to issue a fresh writ at once on application at the Crown Office of this Court at any time before the appeal in this prosecution be heard, and that the return day to such fresh writ be within seven days after the issue of such fresh writ"; and it was further ordered that the prosecutor be at liberty to amend the order of July 29, 1903, accordingly. No fresh writ of habeas corpus was ever in fact issued. Mrs. Pinckney appealed to the Divisional Court by way of motion to set aside the order of Walton J. of July 29, but on December 11, 1903, the Divisional Court (Lord Alverstone C.J., Lawrance and Kennedy JJ.) affirmed the order of the learned judge and dismissed the appeal. From that decision the present appeal was now brought.

Lush, K.C., and *Algernon S. Poyser* with him, for the appellant. The order of the learned judge in chambers was wrong. In substance the orders amounted to a direction that the writ should issue, but should lie in the office until the appellant came within the jurisdiction and could be served with it, although no such direction was in fact made part of the order; there was no jurisdiction to make an order which would have such an effect. The person whom it is sought to restrain by a writ of habeas corpus or of mandamus must be within the jurisdiction of the English Courts at the date of the issue of the writ; if he is out of the jurisdiction there is no power to order the issue of the writ. The burden is on the applicant to shew where the person against whom the writ is sought is at

C. A. 1904

REX v. PINCKNEY.

the date of the application. The right to a writ of habeas corpus is not a mere question between the parties; the foundation of the writ is the right of the Sovereign to be informed why some person is restrained or imprisoned in the realm: *Bourn's Case* (1); originally the writ extended to the colonial possessions of the Crown, and even to Calais, but by 25 & 26 Vict. c. 20, s. 1, it cannot now issue out of England into any colony or foreign dominion of the Crown where there is a Court of justice having authority to issue the writ and to ensure its due execution. Wilmot C.J., in his Opinions and Judgments, at p. 83, discusses the analogy between a writ of habeas corpus and a prerogative writ of mandamus, and holds the view that a writ of habeas corpus ought not to issue as of course—a view which was followed in *Hobhouse's Case*. (2) A prerogative writ of mandamus is not allowed to issue where the applicant is not in a position to avail himself of it, and, by analogy to that writ, it is a fatal objection to the issue of a writ of habeas corpus that the writ cannot operate except as a sentence of perpetual banishment. A similar view of the writ is taken in *Rex* v. *Cowle* (3), where Lord Mansfield says that "to foreign dominions, which belong to a prince who succeeds to the throne of England, this Court has no power to send any writ of any kind."

A further ground on which the present order is bad is that it is a fundamental principle that a writ of habeas corpus shall be immediately served and made effective, which is impossible where the person to whom the writ is directed is out of the jurisdiction, where admittedly the writ cannot be served. An immediate return was essential from the earliest times; and rule 232 of the Crown Office Rules provides that "every writ of habeas corpus ad subjiciendum shall be made returnable immediately." In the present case the writ could not in the nature of things be used for the purpose of informing the Sovereign that some one was imprisoned within the realm, and the only reason for its issue would be in order to punish the appellant indirectly, which is no ground for a writ: *Barnardo*

(1) (1620) Cro. Jac. 543. (2) (1820) 3 B. & A. 420; 22 R. R. 443.
(3) (1759) 2 Burr. 834.

v. *Ford* (*Gossage's Case*). (1) The judges in the Divisional Court seem to have confused the practice in cases of habeas corpus with the practice in attachment.

[They also cited *Reg.* v. *Barnardo*. (2)]

Colefax, for the respondent. The order was right. The question of domicil is not material on an application for a writ of habeas corpus, though it has considerable bearing on the question of the subsequent custody of the child. It is immaterial whether the detention is out of the jurisdiction or not; in *Barnardo* v. *Ford* (1) the child was out of the jurisdiction, but the writ was allowed to issue.

[COLLINS M.R. But the person against whom the writ was issued was in the jurisdiction, and that is the most important point.]

It is not necessary that the person who detains the child should be within the jurisdiction. In *Ex parte Wyatt* (3) the writ was issued against a person who was living in France with the mother of the child and with the child itself, and the writ had been recognised and served by the French authorities.

[COLLINS M.R. That case is not an authority in your favour. Patteson J. refused to grant a rule absolute in the first instance for an attachment for disobedience to the writ, but granted a new writ of habeas corpus because the respondent had then come within the jurisdiction.]

The point now relied on was not taken before the judge in chambers.

COLLINS M.R. I am of opinion that this appeal must be allowed. The original leave to issue a writ of habeas corpus was apparently given under a misapprehension; it was not brought to the attention of the learned judge that the appellant, to whom the writ was directed, was out of the jurisdiction. A difficulty arose with regard to the first writ, and the matter was reconsidered and leave given to issue a fresh one, but it is doubtful whether even then the point was taken before the learned judge in the shape in which it has been taken before

(1) [1892] A. C. 326. (2) (1889) 23 Q. B. D. 305.
(3) (1836) 5 Dowl. 389.

C. A. 1904

REX v. PINCKNEY.

Collins M.R.

us. As a fact it is clear from the evidence that the appellant was out of the jurisdiction at the date of the order; at any rate, there is a very strong presumption that she was so in view of the fact that she made an affidavit in Paris, in which she expressed her intention of remaining out of the jurisdiction if a writ of habeas corpus was granted against her. Under the circumstances it was not strenuously contended on behalf of the respondent that there was jurisdiction to allow the issue of a writ of habeas corpus against a person who was out of the jurisdiction of the Court, and reliance has been placed on a suggested estoppel on the ground that that point was not taken before the judge in chambers. But the mere failure to take such a point cannot give the Court a jurisdiction which otherwise it does not possess, and if the appellant was out of the jurisdiction when leave to issue the writ was given this appeal must, in my judgment, succeed. And the point does not seem to have been present to the Divisional Court, for they seem to have regarded the case as being similar to an application for a writ of attachment, where it is a very usual practice to allow the writ to issue, but to direct that it shall lie in the office of the Court. The whole point of the present case was the jurisdiction to make an order at all; and it would be contrary to the whole spirit of remedial legislation if an interval of time were allowed to elapse between the issue of a writ of habeas corpus and its execution; the execution ought, as far as possible, to follow immediately upon the issue of the writ. I need only add that the case of *Ex parte Wyatt* (1) has been sufficiently distinguished by the observations made during the argument.

MATHEW L.J. I am of the same opinion. I agree entirely with the propriety of that part of the order of the learned judge in which he quashed the original writ of habeas corpus, which he undoubtedly did because he thought it never ought to have issued; but as regards the second part of the order, in which leave was given to the prosecutor to issue a fresh writ, which was not intended for immediate service, I think that it was made without jurisdiction. It has always been a

(1) 5 Dowl. 389.

cardinal principle of the law relating to habeas corpus that the writ must be served immediately, and this principle is adopted in the existing rules of practice of the Crown Office; I never heard of a case in which the writ was allowed to lie in the office to await an opportunity of serving it, and I have no doubt as to the necessity of the writ being served at once.

C. A. 1904

REX v. PINCKNEY.

Mathew L.J.

COZENS-HARDY L.J. I agree.

Appeal allowed.

Solicitors for appellant: *Futvoye & Baker.*

Solicitors for respondent: *Harries, Wilkinson & Raikes.*

W. J. B.

[CROWN CASES RESERVED.]

1904 *March* 12, 30.

THE KING *v.* HUMPHRIS.

Criminal Law—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 12—*Absconding Debtor—"His Property."*

On April 24, 1903, the prisoner, a hay and coal merchant, executed a deed of assignment of all his property for the benefit of his creditors, which deed was on April 27 registered under the Deeds of Arrangement Act, 1887. The deed was also executed by a person as trustee, but not by any of the creditors, none of whom ever knew of its existence. On April 25 the trustee took possession of the prisoner's premises and stock and carried on his business, but otherwise did nothing to carry out the trusts of the deed. At the time the prisoner signed the deed he had in his possession 120*l.* in cash which he had collected from various debtors. He did not pay this sum to the trustee, and on April 28 quitted England taking the 120*l.* with him. On April 30 a bankruptcy petition was presented against the prisoner, on which he was subsequently adjudicated bankrupt.

The prisoner was indicted under s. 12 of the Debtors Act, 1869, for having within four months next before the presentation of the bankruptcy petition quitted England and taken with him 120*l.*, being part of his property which ought by law to be divided amongst his creditors. The prisoner was convicted:—

Held, that no irrevocable trust had been created as to the 120*l.*, and that at the date when the prisoner quitted England the 120*l.* was his property, and not the trustee's under the deed; and that the prisoner was therefore, properly convicted.

Reg. v. *Creese*, (1874) L. R. 2 C. C. 105, distinguished.

CASE stated by the Recorder of Banbury.

The prisoner was tried at the quarter sessions for the borough of Banbury on an indictment charging him with a felony under

1904

REX v. HUMPHRIS.

s. 12 of the Debtors Act, 1869, for having within four months next before the presentation of a bankruptcy petition against him quitted England and taken with him a part of his property to the amount of 20*l.* or upwards, that is to say, a sum of 120*l.* which ought by law to be divided amongst his creditors.

The following facts were proved :—

The prisoner prior to the execution of the deed of assignment hereinafter mentioned carried on the business of a hay and coal merchant at Castle Wharf in the borough of Banbury.

On April 24, 1903, the prisoner, being in pecuniary difficulties, executed a deed of assignment of all his property for the benefit of his creditors.

The said assignment was an indenture dated April 24, 1903, expressed to be made between the prisoner (therein called the debtor) of the first part, William Booth (therein called the trustee) of the second part, and "the several persons and firms whose names and seals are thereunto described and set, being respectively creditors of the debtor of the third part," whereby, after reciting that the debtor being justly and truly indebted unto the parties thereto of the third part in the several sums set opposite to their respective names in the schedule thereto, and being unable to pay the same in full had agreed to convey and assign all his property and effects unto the trustee for the benefit of his creditors as thereinafter mentioned, it was witnessed that in pursuance of such agreement and in consideration of the premises the debtor as beneficial owner thereby granted and conveyed unto the trustee all and every the freehold and leasehold messuages, lands, tenements, and hereditaments whatsoever and wheresoever situate of or belonging to the debtor, to hold the same unto and to the use of the trustee according to the several tenures thereof upon the trusts thereinafter contained and declared concerning the personal estate of the debtor; and it was further witnessed that for the consideration aforesaid the debtor as beneficial owner did by those presents assign and transfer unto the trustee all and every the stock-in-trade, goods, chattels, wares, merchandises, book and other debts, sum and sums of money, and all securities for money, and all other the personal estate and effects whatsoever and wheresoever of him the debtor, to hold the same unto the trustee upon the

following trusts, that is to say, upon trust that the trustee should forthwith sell and dispose of the same either by public auction or private contract, and either together or in lots, with power to make any stipulations as to title or evidence of title as to the trustee should seem necessary, and to buy in and resell the same, and to give any credit for the same, or to take any security for the purchase-money or any part thereof without being answerable for any losses arising thereby, and to receive all book and other debts and securities, and sell and convert into money all the rest and residue of the estate of the debtor, with power to the trustee to accept any composition for any debts or moneys owing to the debtor and to allow time for the payment of the same, and generally upon such terms and conditions, at such times, and in such manner in every respect as to the trustee should seem proper and for the benefit of the estate; and out of the money which should come to his hands by the ways and means aforesaid, in the first place, to pay himself the costs and expenses of such sales, calling in and conversion, the costs, charges, and expenses of or incidental to the carrying those presents into effect (including a fair and reasonable remuneration to the trustee for his services in carrying the same into effect), and all other expenses attending or relating to the trusts thereby created, and in the next place to pay all claims which were by law entitled to be paid in full and in priority to other debts in case of bankruptcy; and upon further trust to pay and divide the clear residue of the said moneys unto and among all the creditors of the said debtor rateably and in proportion to the amount of their respective debts, but subject nevertheless to the provisions thereinafter contained; and it was thereby declared that it should be lawful for the trustee to employ any person or persons in winding up the affairs of the debtor, and in collecting and getting in and disposing of the estate, effects, and premises thereinbefore expressed to be thereby granted and assigned, or any part thereof or otherwise in or about the premises, and to make any remuneration therefor out of the trust estate to the person or persons so to be employed as aforesaid as the trustee should in his discretion think fit. It was provided by the said indenture

1904

REX v. HUMPHRIS.

that nothing therein contained should prejudice any right or remedy which any creditor might have against any other person than the debtor, nor prejudice or affect any mortgage, lien, or security which any creditor might have on any property or effects of the debtor or of any other person; but a creditor holding any such mortgage, lien, or security should be entitled to receive dividends as aforesaid in respect of the amount of the debt owing to him after realizing or giving credit for the value of such mortgage, lien, or security in like manner as he would have had to realize or give credit for the same in order to obtain a dividend in case of bankruptcy. It was also provided by the said indenture that the provisions contained in ss. 31 to 38 inclusive of the Conveyancing and Law of Property Act, 1881, should be applicable thereto and be deemed to be incorporated therein. And it was further witnessed that, in consideration of the conveyance and assignment thereinbefore contained, the trustee and the several persons and firms parties thereto of the third part did thereby respectively release and for ever discharge the debtor and his estate and effects from all and singular the debts, bills, bonds, notes, accounts, costs, damages, expenses, judgments, executions, actions, claims, and demands whatsoever which they the said several persons parties thereto of the third part respectively then had, or should or might otherwise, could or might thereafter have, claimed or demanded of, from or against the debtor or his estate or effects or either of them respectively on account of the debts and securities due or owing from the debtor, and all interest for or in respect of the same or for or on account of any other thing relating thereto. Provided always, and it was thereby expressly declared and agreed, that in case a receiving order should be made against the said debtor within three calendar months of those presents then the release thereinbefore contained should be void and of no effect.

The deed was executed by the prisoner and by the trustee on April 24, 1903, but had never been executed by any creditor, nor was the name of any creditor or the amount of any debt ever inserted in the schedule to the said deed.

On April 24, 1903, before and at the time when the prisoner

executed the deed, he had in his possession the sum of 161*l.* in cash, being moneys due to him which he had collected from various debtors, the whole of which sum he retained instead of handing the same over to the trustee.

The trustee on April 25, 1903, took possession of the prisoner's business premises, stock, and effects at Castle Wharf aforesaid, and continued the business until the appointment of the official receiver under the bankruptcy hereinafter mentioned.

On April 27, 1903, the deed was registered under the Deeds of Arrangement Act, 1887.

On April 28, 1903, the prisoner absconded from, and quitted, England, and went to Canada taking with him the sum of 120*l.*, part of the sum of 161*l.* of which he was possessed on April 24, 1903, and had kept as aforesaid. The prisoner had spent the sum of 41*l.*, the balance of the 161*l.*, for his own purposes between April 24 and the time of his quitting England on April 28.

On April 30, 1903, a bankruptcy petition was presented against the prisoner. A receiving order was thereupon made on May 13, 1903, and on May 18, 1903, the prisoner was adjudicated a bankrupt.

There was no evidence before the Recorder that any creditor knew of the prisoner's intention to execute the deed, or that any creditor had ever in any way assented thereto, or that any creditor ever knew of its existence, or that the trustee had done anything under the deed beyond taking possession of the prisoner's property and effects, and carrying on the business.

At the close of the prosecution it was submitted by counsel on behalf of the prisoner that there was no case to go to the jury, because, on the evidence, the said sum of 120*l.*, taken away by the prisoner on his quitting England, was under and by virtue of the deed the property of the trustee, and not the property of the prisoner at all, and therefore, on the authority of *Reg.* v. *Creese* (1), the case was not within s. 12 of the Debtors Act, 1869.

The Recorder declined, however, to withdraw the case from the jury, but consented to reserve the point. The jury returned

(1) L. R. 2 C. C. 105.

1904

REX v. HUMPHRIS.

a verdict of guilty, and the prisoner was sentenced to six months' imprisonment in the second division, but was released on bail pending the decision of the Court.

The question for the opinion of the Court was whether the sum of 120*l.* so taken away by the prisoner when he quitted England as aforesaid on April 28, 1903, was "his," the prisoner's, property within the meaning of s. 12 of the Debtors Act, 1869. (1)

Vachell, for the prisoner. At the time the prisoner left England the money in question was not his property, but was the property of the trustee under the deed of assignment. The conviction cannot be sustained without overruling *Reg.* v. *Creese* (2), which is on all-fours with the present case. The only distinction between the two cases is that now the execution of a deed of assignment for the benefit of a man's creditors is in itself an act of bankruptcy; but that distinction is immaterial, because the deed is not thereby rendered void.

H. Sutton, for the prosecution. *Reg.* v. *Creese* (2) is distinguishable. There the creditors were parties to the deed, and it was therefore irrevocable. Here the deed is revocable, because the creditors were not parties to it, and it had never been communicated to them: *Acton* v. *Woodgate* (3); *Johns* v. *James*. (4) The trustee never obtained possession of this money. It remained in the possession of the prisoner, and he was the only person who had a title to it at the time of the alleged offence. The conviction was, therefore, right.

Vachell, in reply. As between the prisoner and the trustee

(1) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 12: "If any person who is adjudged a bankrupt or has his affairs liquidated by arrangement after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months before such presentation or commencement, quits England and takes with him, or attempts or makes preparation for quitting England and for taking with him, any part of his property to the amount of twenty pounds or upwards which ought by law to be divided amongst his creditors, he shall (unless the jury is satisfied that he had no intention to defraud) be guilty of felony, punishable with imprisonment for a time not exceeding two years, with or without hard labour."

(2) L. R. 2 C. C. 105.

(3) (1833) 2 My. & K. 492; 39 R. R. 251.

(4) (1878) 8 Ch. D. 744.

the deed was irrevocable. The trust in favour of the trustee had been executed by his taking possession of the prisoner's property: *Siggers* v. *Evans*. (1) Although the trustee had not actual physical possession of this particular sum of money, yet he had a good title to it under the deed; it was his property, not the prisoner's.

Cur. adv. vult.

March 30. LORD ALVERSTONE C.J. read the following judgment:—This was a case stated by the Recorder of Banbury on the conviction before him of the prisoner on a charge under s. 12 of the Debtors Act, 1869, of having within four months next before the presentation of a bankruptcy petition against him quitted England, and taken with him a part of his property to the amount of 20*l.* and upwards, that is to say, a sum of 120*l.*, which ought by law to be divided amongst his creditors. The prisoner was proved to have so quitted England taking with him 120*l.*; but he had, shortly before going, executed a deed of assignment of all his estate to a trustee for the benefit of his creditors, and it was contended on his behalf on the authority of the case of *Reg.* v. *Creese* (2) that the 120*l.* was not "part of his property" within the meaning of the section. That case is undoubtedly somewhat similar to the present, and we have to consider whether it is distinguishable. There the charge was preferred under sub-s. 5 of s. 11 of the Debtors Act, 1869, as to fraudulently removing "any part of his property," and it is impossible, we think, to put a different meaning on the words "any part of his property" in s. 12 to that which they bear in s. 11, sub-s. 5. But for the doubts created by the decision in *Reg.* v. *Creese* (2) we should certainly have held that "his property which ought to be divided amongst his creditors" in the section in question included property which had been his, which remained in his possession, and the title to which, so far as parted with at all, had only been parted with by him in such a way as to leave it still divisible amongst his creditors in the event of bankruptcy. The concluding words of the section, "unless the jury are satisfied there was

(1) (1855) 5 E. & B. 367. (2) L. R. 2 C. C. 105.

1904

REX v. HUMPHRIS.

Lord Alverstone C.J.

no intention to defraud," would be sufficient to protect the accused where he had acted innocently and not in contemplation of bankruptcy. We have, however, to see whether if we so held it would be contrary to anything really decided in *Reg.* v. *Creese* (1), and for that purpose we have to consider the facts of that case and this. In *Reg.* v. *Creese* (1) the assignment of December 21, 1872, had been acted upon, and was undoubtedly a genuine transaction; further advances were made upon it; Creese entered the service of Lakin & White, the trustees under the deed, pursuant to the terms of it, and for several months continued to act as the agent and bailiff of the trustees. The bankruptcy of Creese did not take place until October 17, 1873, nearly a year after the date of the deed, and the removal, which was the alleged offence under s. 11, sub-s. 5, took place on the 14th, 16th, and 17th of October, 1873. The only ground on which the title of the trustees of the deed failed was that the deed of December, 1872, had not been registered as a bill of sale. It seems to us, therefore, that the Court was right in holding that at the date of the alleged fraud the property really belonged to the trustees and not to Creese. We agree, therefore, that *Reg.* v. *Creese* (1) was rightly decided, the facts of that case being as stated; but if the reasoning of the Court lays down any general rule which would exempt the defendant in this case from responsibility, we do not agree with it. The facts in this case appear to be different. Except by the trustee taking possession of the stock and effects, the deed does not appear to have been ever acted on. The 120*l.* with which the prisoner absconded was, no doubt, money which the trustee under the deed might have claimed from him by virtue of the assignment, but he never did get it as the trustees of the deed in *Creese's Case* (1) got the stock which Creese misappropriated; and at most the trustee here had a mere paper title. Nothing took place which would make this money which the defendant was obviously keeping back from his creditors, and which he had in his actual possession and was not holding for the trustee, in any real sense the property of the trustee under the deed executed three days before the absconding. We do not adopt

(1) L. R. 2 C. C. 105.

the view that the deed was revocable so far as regards the property of which the trustee under it got possession, for the trustee had an interest in it. James L.J. in *Johns* v. *James* (1) says: "You cannot revoke the deed and cannot get the property out of the hands of the trustee until, at all events, you have satisfied all the charges and expenses he has incurred, and any right he has acquired in the property. It is not a revocation of the deed, but it is a revocation of the directions given by the deed to the assignor's agent as to what he shall do with the proceeds." The deed, therefore, was not revocable; but as to the money of which the trustee never got possession, no irrevocable trust appears to have been created. We think the Recorder was right in leaving this case to the jury, and that on the facts the 120*l.* was, when taken away by the prisoner, his property which ought by law to be divided amongst his creditors; and that any claim which the trustee under the deed might have to have the money handed over to him is not sufficient to prevent the operation of s. 12 of the Debtors Act, 1869. The conviction must be affirmed, and the defendant be ordered to serve the remainder of his sentence.

GRANTHAM J. I agree.

BRUCE J. I agree that the conviction must be affirmed; but I wish to add that I think the facts in *Reg.* v. *Creese* (2) were very different from the facts in the present case. In this case the deed of assignment was a voluntary deed executed by the debtor for the benefit of his creditors, and was not communicated to them, and so was revocable by him except in so far as the trustee had acquired an interest in the property assigned; but so long as there were proceeds to meet the claim of the trustee for his expenses in acting under the directions of the deed, the debtor was at liberty to revoke the mandate contained in the deed so far as it related to the residue of his property. I think there was no evidence whatever to shew that the trustee had acquired any interest in the sum of 120*l.* in question. When, on April 28, the debtor appropriated the

(1) 8 Ch. D. 744, at p. 751. (2) L. R. 2 C. C. 105.

1904

REX v. HUMPHRIS.

Bruce J.

sum of 120*l.*, which had never been in the possession of the trustee, I think he revoked the mandate to the trustee contained in the deed so far as it related to the 120*l.* In the case of *Reg.* v. *Creese* (1) the deed was not a voluntary deed, for part of the consideration of the deed was a sum of 350*l.* paid by one of the trustees to the debtor. The deed, therefore, in that case was not a revocable deed, and the money which the prisoner appropriated he had received as the servant or bailiff of the trustees, and the money was clearly the money of the trustee.

CHANNELL J. I agree.

Conviction affirmed.

Solicitors for prisoner: *Crowther & Davis, Leamington.*
Solicitor for the Crown: *Solicitor to the Treasury.*

(1) L. R. 2 C. C. 105.

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1904
April 19.

WILSON *v.* TWAMLEY.

Landlord and Tenant — Lease of Public-house — Covenant by Lessee not to "suffer" an Act to be done—Act by Sub-lessee through which Renewal of Licence refused.

A lease of a public-house contained a covenant by the lessee for himself, his heirs, executors, administrators, and assigns, that he would use the premises as a public-house or beerhouse only, and would carry on, or suffer, on the premises no other trade, business, or manufacture during the term, without the consent of the lessor, and that he would not do, or suffer to be done on the premises, any act whereby the licences might be forfeited, or indorsed, or the renewal of them withheld. The lease of the premises having been assigned to the defendant, he underlet them to an underlessee, who was convicted of an offence against the licensing laws, by reason of which the renewal of the licences was refused. In an action by the plaintiff, as assignee of the reversion, against the defendant, as assignee of the lease, for breach of the above-mentioned covenant :—

Held, that, the sub-lessee not being the servant or agent of the defendant, the latter could not be said to have done or suffered to be done the act by reason of which the licence was not renewed, and therefore the action was not maintainable.

APPEAL by plaintiff from the judgment of Kennedy J. in an action tried by him with a jury.

The action was by assignee of the reversion on a lease of licensed premises against assignee of the lease for breach of a covenant contained therein, by reason of which breach the licence of the premises was lost. The lease contained a covenant by the lessee for himself, his heirs, executors, administrators, and assigns in the following terms: "And will use the said premises as a public-house or beerhouse only, and will carry on, or suffer, on the said premises, or any part thereof, no other trade, business, or manufacture during the said term without the previous consent in writing of the lessor, and will not do, or permit to be done, on the said premises, or any part thereof, any act or thing which may be a nuisance, or annoyance to the lessor or adjoining occupiers, or use the said premises for any immoral purpose, and will not affix any boards or advertisements, bills, or placards to the outside of the said

C. A. 1904

WILSON v. TWAMLEY.

premises, or otherwise than relating to the beerhouse trade, without the lessor's consent in writing, and particularly will not do, or suffer to be done, on the said premises, or any part thereof, any act whereby the licences necessary for using the said messuage and premises as an inn, beerhouse, or public-house, with billiards, as now used, may be forfeited, or indorsed, or the renewal withheld, and will at all times take proper legal steps and proceedings, and endeavour to procure a renewal of the necessary licences for so using the same." There was also a covenant in the lease by the lessee not, except by way of mortgage, to assign, transfer, or underlet the premises without the consent in writing of the lessor first had and obtained, provided that such consent should not be unreasonably withheld on a responsible tenant being offered with satisfactory references. The lease was assigned to the defendant with the consent of the lessor, and he subsequently underlet the premises to one Kingston, who covenanted in the underlease to maintain and keep in full force, and, when necessary, renew the existing licence in respect of the said house, and conduct the same in a proper and orderly manner, and not to do any act whereby such licence might be imperilled, liable to be forfeited, or prejudicially affected. By the underlease Kingston undertook to take his supplies of beer from the defendant. Through the act of a servant in Kingston's employ in serving a drunken man with liquor, he was convicted of an offence against the licensing laws, and the conviction was indorsed on the licence; and in consequence thereof the justices subsequently refused to renew the licence of the premises. It was stated that the consent of the lessor in writing had not been obtained previously to the underlease to Kingston, but no claim was made in the statement of claim for a breach of the covenant not to underlet without the lessor's consent; and Kennedy J. held that, assuming that there had been such a breach, that fact could not make any difference with regard to the question whether there had been a breach of the covenant upon which the action was brought. The jury assessed the damages caused by the loss of the licence provisionally at 150*l.*, and the learned judge reserved the legal question whether there

had been upon the facts any breach by the defendant of the covenant not to do, or suffer to be done, on the premises any act whereby the licence might be forfeited, or indorsed, or the renewal withheld. On further consideration he held that there had been no such breach, and gave judgment for the defendant.

C. A. 1904

WILSON v. TWAMLEY.

English Harrison, K.C., and *C. Herbert Smith*, for the plaintiff. The covenant sued upon must be read as a whole, and construed with reference to the nature of the subject-matter of the lease. In the case of licensed premises it is obviously essential to maintain the character of the premises as such, and the licence. The covenant here begins with an absolute undertaking by the lessee to use the premises as a public-house or beerhouse, and not otherwise, which clearly has not been complied with by the defendant. Then, with regard to the construction of the undertaking not to do, or suffer to be done, any act whereby the licence may be forfeited or not renewed, it is submitted that the word "suffer" is one of a somewhat indeterminate meaning, and must be construed in this case by reference to the context, and the plain object of the covenant. The defendant might have prevented the act by reason of which the licence was not renewed, if he had not parted with the control of the premises; and in that sense he may be said to have suffered the act to be done. The construction put on the covenant by the learned judge really deprives it of nearly all value; for, according to his view, the lessee has only got to underlease the premises for the residue of the term less a few days, and the efficacy of the covenant is gone. The plaintiff never consented in writing to the underlease; and the defendant, having wrongfully underlet the premises, cannot be heard to say that he had no control over them when the act by which the licence was lost took place. The learned judge in the Court below treated the case as really concluded by the decision in *Bryant* v. *Hancock & Co.* (1); but the covenant in that case contained the word "wilfully," which is absent in the present case, and the decision turned on that word; for the stress laid upon it shews that, in its

(1) [1898] 1 Q. B. 716; [1899] A. C. 442.

C. A. 1904

WILSON v. TWAMLEY.

absence, the covenant would have been construed in accordance with the contention for the plaintiff in the present case.

Bray, K.C., and *Frank Russell*, for the defendant. The case was not put at the trial on any breach of covenant by the defendant's not using the premises as a public-house. It is impossible to split up the covenant as suggested, and treat the fact that the premises, after the loss of the licence, lost the character of a public-house, remaining merely an ordinary dwelling-house, as a breach of covenant. The substance of that part of the covenant is that they shall not be used for any other trade or business, and there was no evidence that they were so used. The covenant cannot be read as importing an independent undertaking to use the premises as a public-house when they had become unlicensed. Again, no point was made in the pleadings, nor, in substance, at the trial, that there had been a breach of the covenant not to underlet without the plaintiff's consent; and it must be assumed that she had consented to the underlease. But, assuming that the granting of the underlease was a breach of the covenant not to underlet without consent, that could not alter the relation of underlessor and underlessee, or convert the latter into a servant or agent of the former. The sole question is whether the defendant can be said to have done, or suffered to be done, on the premises any act whereby the licence was not renewed. The defendant certainly did no such act, and he cannot be said to have suffered any such act to be done. The only act which the defendant did was to underlet the premises, and that could not be said to be an act done on the premises. A sub-lessee is not the servant or agent of the sub-lessor: *Toleman* v. *Portbury*. (1) The plaintiff seeks to read the covenant as an absolute covenant that no act shall be done on the premises whereby the licence may be forfeited or its renewal refused. But, if that had been the intention of the parties, they would have contracted plainly in those terms.

[They also cited on this point *Bond* v. *Evans* (2); *Bosley* v. *Davies* (3); *Redgate* v. *Haynes* (4); *Somerset* v. *Hart*. (5)]

(1) (1870) L. R. 5 Q. B. 288.
(2) (1888) 21 Q. B. D. 249.
(3) (1875) 1 Q. B. D. 84.
(4) (1876) 1 Q. B. D. 89.
(5) (1884) 12 Q. B. D. 360.

In this case the lease contemplates that the premises may be underlet. Possibly, if the defendant had sub-let the premises without imposing any terms on the sub-lessee to safeguard the lessor against acts which might lead to the licence not being renewed, the contention that he might be said to have suffered such an act to be done by the sub-lessee might be less hopeless; but here the defendant imposed upon the sub-lessee a covenant of at least as stringent a character as that which he himself had entered into. It is to be observed that the lessee covenants expressly for his assigns, but not for his undertenants. In *Bryant* v. *Hancock & Co.* (1) it was held in the Court of Appeal that the word "assigns" did not include underlessees, and it was not even contended in the House of Lords that it did.

English Harrison, K.C., for the plaintiff, in reply. The question in *Toleman* v. *Portbury* (2) was whether there had been a forfeiture by reason of a breach of covenant. In such cases a Court generally, if there is any doubt, inclines against a forfeiture. Only some of the judges decided the case on the ground that the lessee had not permitted the act complained of, the others deciding on the ground that some evidence ought to have been given of the absence of consent to it by the lessor.

COLLINS M.R. This is an appeal from a judgment of Kennedy J. upon the construction of a covenant of a lease in an action for damages for breach of the covenant. The covenant was in the following terms. [The Master of the Rolls here read the covenant.] What happened was this. The defendant, who was assignee of the lease, sub-let the premises to another person, during whose term an offence was committed against the licensing laws, by reason of which the renewal of the licence was subsequently refused. The plaintiff alleged that by reason of what had occurred there had been a breach of the covenant by the defendant. Kennedy J. decided that, having regard to the terms of the covenant, and the circumstances under which the act treated as a breach occurred, no breach of the covenant was proved. He held that, the

(1) [1898] 1 Q. B. 716; [1899] A. C. 442. (2) L. R. 5 Q. B. 288.

C. A. 1904

WILSON v. TWAMLEY.

Collins M.R.

defendant having sub-let the premises, there was no connection between him and the sub-lessee, by virtue of which the latter could be said to be in any sense his agent; and that, the covenant by the defendant being not to do, or suffer to be done, any act through which the renewal of the licence might be withheld, unless it could be shewn that either he, or some person acting as his agent, had done or suffered such an act, he could not be responsible under the covenant. The plaintiff contends that this decision was wrong. Both parties rely upon the case of *Bryant* v. *Hancock & Co.* (1) Kennedy J. relied in giving judgment upon that case, but it is contended for the plaintiff that it is really in his favour. There is some danger, I think, in endeavouring to construe a covenant by the aid of a decision on another covenant in different terms; and, when I look at the terms of the covenant in *Bryant* v. *Hancock & Co.* (1), I do not think that the decision in that case is applicable as suggested for the plaintiff. There is an important difference between the covenant there and that in the present case. The covenant in that case consisted of two parts, the first part being absolute in its terms, and the second being qualified by the introduction of the word "wilfully." The second part of the covenant applied to a matter which might also, in the ordinary use of language, be said to be described by the language of the first part; a matter which, if the word "wilfully" had not been used in the second part, would come equally well within the terms of either part. The difficulty was as to whether, upon the construction of the covenant, the matter in question might be treated as coming within the first part, which was wide enough to cover it, and was not qualified by the word "wilfully"; and it was held that, because the covenant was divided into two parts, one so qualified and the other unqualified in its terms, the subject-matter of the first part must be limited, so as to give effect to the qualification imported by the word "wilfully" in the second part. Stress was laid on the effect of that word as shewing that what would primâ facie come within the terms of the first part of the covenant, could not be meant to do so, because in that case due effect could not be given to the second part, which was qualified by the word "wilfully."

(1) [1898] 1 Q. B. 716; [1899] A. C. 442.

The word "wilfully" is not contained in the covenant in this case; but, when one looks at the reason why so much stress was laid on it in the case of *Bryant* v. *Hancock & Co.* (1), one sees that that reason is quite irrelevant to the present case. Here the defendant cannot be said to have done, or suffered to be done, the act relied on as a breach of the covenant, because the relation of sub-lessor and sub-lessee does not involve any connection between them in the nature of that between principal and agent. If the defendant had, instead of sub-letting the premises, put in a manager, who had done or suffered the act by reason of which the licence was not renewed, then he could not have said that it was done or suffered by another person for whom he was not responsible. He would have put another person in his place to act as his alter ego, and must have taken the risk of what happened through his acts or defaults. But that is not the present case. I should say that, primâ facie, the meaning of the words "do or suffer to be done" is that they must involve the doing of some act, or some abstention from action, by the covenantor himself, or by some person standing in the relation of agent to him, a relation which does not exist as between lessor and lessee. But the matter does not rest there, for I think that the decision in *Toleman* v. *Portbury* (2) is an authority to that effect. There the lessee had covenanted not to "permit" a sale by auction to be held on the premises without the consent of the lessor. He sub-let to a person, who did permit such a sale to be held. Thereupon an action was brought to recover the premises as on a forfeiture of the lease for breach of the covenant. A majority of the judges in that case held that the act of the sub-lessee in permitting the sale could not be treated as the act of the lessee, so as to constitute a breach of the covenant by him, because the sub-lessee was not his agent. The same reasoning appears to me to apply to the present case. For these reasons I think the appeal must be dismissed.

ROMER L.J. I am of the same opinion. I will deal first with the suggestion that the plaintiff is entitled to succeed on

(1) [1898] 1 Q. B. 716; [1899] A. C. 442. (2) L. R. 5 Q. B. 288.

C. A. 1904

WILSON v. TWAMLEY.

Romer L.J.

the ground that there was a breach by the defendant of the undertaking that the premises should be used as a public-house or beerhouse only. It seems to me clear that this covenant cannot be construed as an absolute covenant that the premises shall always remain licensed, or as importing that the lessee undertakes that the licence shall never be forfeited, and always be renewed. Take a case in which, through no act or default of the lessee, the licence is not renewed, as, for instance, where the justices refuse to renew it, because they think that there are too many licensed houses in the neighbourhood. I should say that clearly a case in which premises ceased to be used as a public-house under such circumstances would not come within the covenant. The substance of that part of the covenant appears to me to be that the lessee will not use the premises for any other business than that of a public-house or beerhouse; and, if the point were before us, which I think is not the case, because it was not really gone into at the trial, I should be inclined to hold that the mere fact that the lessee remains in possession of the dwelling-house after the licence is not renewed, without doing anything more, is not a breach of that covenant. Even if it were, what damage would have been occasioned? Substantially none, I think. The mere fact of the premises continuing to be used as a dwelling-house after the loss of the licence would not make the lessee liable for the loss occasioned by its non-renewal. I do not think that the plaintiff can succeed on the first ground taken.

I pass on to the main point, namely, whether there has been any breach of the covenant not to do, or suffer to be done, on the premises any act whereby the licence may be forfeited, or indorsed, or its renewal withheld. It is obvious that this is not an absolute covenant that no such act shall be committed. It is limited in two ways. First, it is expressed to be on behalf of the lessee, his heirs, executors, administrators, and assigns. The word "assigns" has a definite legal meaning, and does not ordinarily include underlessees; nor do I know of any benevolent system of construction by which in a lease of this kind it can be extended beyond its ordinary meaning so as to include them, unless there be something in the context

requiring such an extension of its meaning. That certainly does not appear to me to be the case in this lease, for the only provisions here as to underletting are that the lessee shall not underlet without the consent of the lessor, and that such consent shall not unreasonably be withheld, thereby shewing that the parties contemplated that the premises might be underlet. Moreover the house appears to be a beer-house, and therefore would ordinarily be carried on by an undertenant. It seems to me impossible to say that the word "assigns" in this covenant includes undertenants. The covenant is also limited in another respect. It is not a covenant that no act whereby the licence may be lost shall be done or suffered on the premises, but that the covenantor will not do or suffer any such act to be done on the premises. A man may do an act himself, or by his servant or agent, but not by his undertenant, unless he has expressly authorized him to do the act. It is not suggested in this case that the defendant authorized the act by reason of which the licence was not renewed. Therefore there was no breach by the defendant of the covenant not to do such an act. Then can it be said that he has suffered such an act to be done? Clearly not, in my opinion. That being so, the plaintiff cannot succeed on that covenant.

With regard to the last suggestion made on behalf of the plaintiff, namely, that the undertenant had been put into possession of the premises without the consent of the lessor, it seems to me that, assuming that to be so, it has nothing to do with the case. In the first place, it was not alleged in the pleadings or proved that the underletting was a breach of the covenant not to underlet without the consent of the lessor; and, if it were, the underlessee still remains an underlessee, and it could not, I think, be said that, because there had been a breach of that covenant, he became the servant or agent of the defendant, or that an estoppel was created against the defendant by which he was prevented from denying that the underlessee was his agent. Moreover, it is difficult to see how the damages for loss of the licence could be said to arise out of a breach of the covenant not to underlet the premises without consent.

C. A. 1904

WILSON v. TWAMLEY.

MATHEW L.J. I am of the same opinion. I agree that the plaintiff is not entitled to rely upon the covenant to use the premises as a public-house or beerhouse only. The meaning of that covenant is shewn by the subsequent words which provide that the lessee shall not carry on any other trade or business on the premises. It cannot be said that any other trade or business was carried on upon the premises, because, through the loss of the licence, they had lost the character of a public-house, merely retaining that of an ordinary dwelling-house.

With regard to the other point, at first it appeared to me on the facts that there might be some ground for contending that the supposed underlessee was in reality only a manager, who was to carry on the house on behalf of the defendant. But, on looking more closely into the matter, it appeared clear that this was not so, and that there was a bonâ fide underlease by the defendant to a tenant, against whose character nothing could be said, though unfortunately some one in his employment caused the licence not to be renewed by supplying liquor to a drunken man. I do not think that, under the circumstances, the case can be regarded otherwise than as if the lessor's consent had been given to the underlease. It is clear that a right was given by the lease to underlet to a suitable tenant on reasonable terms, and by the underlease the defendant took every reasonable precaution to prevent the undertenant from contravening the covenant. The effect of the underlease was that the complete control of the premises passed into the hands of the undertenant, and, in providing that there might be an underlease, it must have been contemplated that this result would follow. On the assumption that the consent of the plaintiff was obtained to an underlease, it might just as well be said that the plaintiff suffered the act in question as that the defendant did so.

Appeal dismissed.

Solicitors for plaintiff: *Pearce & Rowse.*

Solicitors for defendant: *Beaumont, Son & Rigden.*

E. L.

LIVINGSTONE *v.* MAYOR, ALDERMEN AND COUNCILLORS OF THE CITY OF WESTMINSTER.

1904
March 4, 9.

Local Government—Abolition of Office—Compensation—Emoluments—Period for Calculation—Jurisdiction to fix Amount—Rescission of Resolution—Surcharge—London Government Act, 1899 (62 & 63 *Vict. c.* 14), *s.* 30, *sub-ss.* 1, 2, 4—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 120, *sub-ss.* 1, 2, 3, 4, 6—*Superannuation Act*, 1859 (22 & 23 *Vict. c.* 26), *ss.* 2, 7.

Where on a transfer of powers and officers from a vestry to a borough council under the London Government Act, 1899, an officer, whose office is abolished, makes a claim for compensation, the council is the proper tribunal to decide, with a view to assessing his compensation, what has been the amount of his salary and emoluments, and their finding of fact cannot be reviewed by the Court.

Where a borough council after investigation of the circumstances have passed a resolution under s. 120 of the Local Government Act, 1888, assessing the compensation payable to an officer for the abolition of his office, this resolution is binding on the council, and cannot be rescinded by a subsequent resolution on the ground that the amount claimed and assessed is excessive.

In 1874 the plaintiff was appointed surveyor to the vestry of St. George, Hanover Square, at a salary of 350*l.* a year, which was increased from time to time. By the London Government Act, 1899, the borough of Westminster was constituted, which included the parish of St. George. In May, 1901, the Westminster City Council abolished the plaintiff's office, and he sent in his claim for compensation based on the average of his salary and emoluments for the five years previous to the abolition of his office. On August 1, 1901, the council passed a resolution granting him the amount claimed, namely, 518*l.* 12*s.* 4*d.* a year. There was no appeal to the Treasury from this resolution. In November, 1902, the auditor disallowed part of the compensation on the ground that it did not properly represent emoluments, and he surcharged the members of the council with the amount. On November 20, 1902, the council passed a resolution rescinding their resolution of August 1, 1901, and reducing the plaintiff's allowance to 432*l.* 7*s.* 10*d.* He appealed to the Treasury, but the appeal was disallowed, and in July, 1903, commenced this action against the corporation for the arrears of his allowance:—

Held, that the period of five years of which the plaintiff had given particulars was the right period, but that it was immaterial, as the council had a general power to assess; that the question what was the amount of the plaintiff's salary and emoluments was a question of fact which must be decided by the council, and it was not competent for the Court to review their decision; that even if the council exceeded the right amount

1904

LIVINGSTONE v. WESTMINSTER CORPORATION.

their decision was not ultra vires; the vote was good up to the proper limit; that the resolution of August 1, 1901, was valid; the council had no power to relieve themselves from the obligation thus rendered binding upon them, and the resolution to rescind it was invalid.

ACTION by the plaintiff to recover compensation alleged to be due to him on the abolition of his office under the Local Government Act, 1899. (1)

(1) By the London Government Act, 1899 (62 & 63 Vict. c. 14), s. 30, "(1.) Where the powers and duties of any authority are transferred by or under this Act to any borough council, the existing officers of that authority shall be transferred to and become the officers of that council The council may abolish the office of any such officers whose office they may deem unnecessary . . .

"(2.) Sub-ss. 4 and 7 of s. 81 of the Local Government Act, 1894, shall apply to the existing officers affected by this Act as if references in those sub-sections to the district council were references to the borough council."

By the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 81, sub-s. 7, s. 120 of the Local Government Act, 1888, which relates to compensation to existing officers, shall apply in the case of existing officers affected by this Act.

By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 120, "(1.) Every existing officer declared by this Act to be entitled to compensation, and every other existing officer who by virtue of this Act, or anything done in pursuance of or in consequence of this Act, suffers any direct pecuniary loss by abolition of office shall be entitled to have compensation paid to him for such pecuniary loss by the county council, to whom the powers of the authority whose officer he was are transferred under this Act, regard being had to the conditions on which his appointment was made, to the nature of his office or employment, to the duration of his services, to any additional emoluments which he acquires by virtue of this Act or of anything done in pursuance of or in consequence of this Act and to all the other circumstances of the case, and the compensation shall not exceed the amount which, under the Acts and rules relating to Her Majesty's Civil Service, is paid to a person on abolition of office.

"(2.) Every person who is entitled to compensation, as above mentioned, shall deliver to the county council a claim under his hand setting forth the whole amount received and expended by him or his predecessors in office, in every year during the period of five years next before the passing of this Act, on account of the emoluments for which he claims compensation

"(3.) Such statement shall be submitted to the county council, who shall forthwith take the same into consideration, and assess the just amount of compensation (if any) and shall forthwith inform the claimant of their decision.

"(4.) If a claimant is aggrieved by the refusal of the county council to grant any compensation, or by the amount of compensation assessed the claimant may, within three months after the decision of the council, appeal to the Treasury, who

On May 7, 1874, Mr. George Livingstone, the plaintiff, was appointed surveyor to the vestry of St. George, Hanover Square, at a salary of 350*l.* a year and a house. On August 19, 1875, the vestry resolved "that in the event of the surveyor finding a horse and vehicle to assist him in superintending outdoor work the vestry make an allowance to him of 20*l.* per annum, and provide fodder, stable-room, and attendance." Under this resolution the horse, carriage, and harness were the plaintiff's own property, and he had the use of them for all purposes when not required officially. On January 4, 1883, the plaintiff's salary was increased to 450*l.* per annum, and on July 21, 1887, to 550*l.* On August 7, 1890, it was resolved that the plaintiff should give up his official residence and receive an addition to his salary of 100*l.* On March 3, 1888, his salary was increased to 700*l.*, and on March 1, 1900, to 800*l.* On October 18, 1900, the plaintiff was voted an honorarium of 100*l.* for extra services.

By the London Government Act, 1899, there was constituted the borough of Westminster, which included amongst other parishes that of St. George, Hanover Square; and under s. 30, sub-ss. 1 and 3, of that Act the plaintiff became an officer of the corporation of Westminster. On January 31, 1901, the Westminster City Council resolved that the plaintiff should, without prejudice to the amount of his compensation for abolition of office, be appointed city engineer and surveyor for three months, or until a permanent city engineer and surveyor should be appointed, and should enter on his duties, whichever period should be the longest, and that he should continue to perform his duties as surveyor of the parish of St. George at a salary of 83*l.* 6*s.* 8*d.* per month, on condition that he undertook not to apply for the permanent appointment.

shall consider the case and determine whether any compensation, and if so what amount, ought to be granted to the claimant, and such determination shall be final."

"(6.) The sum payable as compensation to any person in pursuance of this section shall commence to be payable at the date fixed by the council on granting the compensation, or, in case of appeal, by the Treasury, and shall be a specialty debt due to him from the county council, and may be enforced accordingly in like manner as if the council had entered into a bond to pay the same."

1904

LIVINGSTONE v. WESTMINSTER CORPORATION.

On May 9, 1901, the council resolved that the office of surveyor of the parish of St. George should be abolished as from May 31, 1901, and that the plaintiff should be requested to send in his claim for compensation on abolition of office. The council were advised that for this purpose the plaintiff's salaries and emoluments should be aggregated for a period of five years from the date of the abolition of his office. These requirements were communicated to the plaintiff, and on July 22, 1901, he sent in his claim on a form supplied to him by the council. In this he claimed as emoluments 20*l.* a year for his allowance towards keeping a horse and carriage, 115*l.* a year for coachman's wages and keep of horse, and 25*l.* a year for stable and coach-house. He deducted 40*l.* a year as his proportion of the 115*l.* His entire claim was for an annual allowance of 518*l.* 12*s.* 4d., being thirty-seven-sixtieths of 841*l.*, his average salary and emoluments for the five years ending on May 31, 1901. The council's establishment sub-committee, after questioning the plaintiff about his emoluments, approved of his claim, and referred it to the general purposes committee, who reported it to the council for settlement at the full sum claimed.

On August 1, 1901, the council resolved that the plaintiff should be granted the annual allowance of 518*l.* 12*s.* 4*d.*, being one-sixtieth for each year of service (i.e., twenty-seven years) plus ten-sixtieths for compulsory abolition of office—total, thirty-seven-sixtieths of his average salary and other emoluments for the five years next before the date of the abolition of his office.

No one appealed to the Treasury against this resolution, and the compensation was paid to the plaintiff by monthly instalments of 43*l.* 4*s.* 4*d.* down to and including November 1, 1902. On November 6, 1902, the auditor surcharged the members of the council with 61*l.* 13*s.* 5*d.*, part of the allowance paid to the plaintiff for the ten months ending March 31, 1902. This surcharge was made on the ground that the allowance for keeping a horse and carriage was not an emolument for which compensation ought to be given. On November 20, 1902, the council, at a meeting said to have been specially called for that purpose, resolved: "(*a*) That the resolution of the council of

the 1st August, 1901, granting Mr. Livingstone an annual allowance of 518*l.* 12*s.* 4*d.*, be rescinded; (*b*) that in lieu thereof Mr. Livingstone be granted an annual allowance of 432*l.* 7*s.* 10*d.*, in accordance with the Treasury scale, being one-sixtieth for each complete year of service (i.e., twenty-seven years) plus ten-sixtieths for compulsory abolition of office—total, thirty-seven-sixtieths of the average salary and other emoluments of the office for the five years next before the date of the abolition of the office, which amounted to 701*l.* 12*s.*, and that such annual allowance shall commence to be payable, subject to a proper adjustment of the same and of the amounts already paid, as from the date of such abolition."

The plaintiff appealed to the Treasury, but to no purpose, and on July 10, 1903, commenced this action against the corporation for the arrears of his allowance.

The action was heard before Buckley J. (sitting as an additional judge of the King's Bench Division) without a jury.

Danckwerts, *K.C.*, and *W. F. Craies*, for the plaintiff. The plaintiff is entitled to compensation under the London Government Act, 1899, s. 30, the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 81, sub-s. 7, the Local Government Act, 1888, s. 120, and the Superannuation Act, 1859, ss. 2, 7. The resolution of August 1, 1901, by which the council allowed the plaintiff 518*l.* 12*s.* 4*d.*, was valid and conclusive, and the Court cannot go behind it. Nor can the auditor act as a Court of appeal from their decision: s. 120, sub-ss. 2 and 3, of the Local Government Act, 1888. The council are the sole judges of the facts. If their assessment goes beyond the proper limits it is ultra vires pro tanto, but if they have exercised their discretion the Court cannot deal with the question. The only appeal is to the Treasury: *Rex* v. *Stepney Corporation* (1); *Brittain* v. *Kinnaird* (2); *Reg.* v. *Bolton* (3); *Allen* v. *Sharp* (4); *In re Holborn Land Tax Assessment.* (5) The resolution of November 20, 1902, was invalid. The council had no power

(1) [1902] 1 K. B. 317.
(2) (1819) 1 B. & B. 432; 21 R. R. 680.
(3) (1841) 1 Q. B. 66; 55 R. R. 209.
(4) (1848) 2 Ex. 352.
(5) (1850) 5 Ex. 548.

1904

LIVINGSTONE v. WESTMINSTER CORPORATION.

to rescind the resolution of August 1, 1901. The last-mentioned resolution created an obligation in the nature of a specialty debt, just as if the council had executed a bond for that purpose: s. 120, sub-s. 6, of the Local Government Act, 1888. Such an obligation cannot be revoked. There is no suggestion of fraud or of any non-exercise of discretion.

The resolution could only be revoked at a meeting specially called for the purpose: Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 57; and on notice of the special purposes for which it is called: Metropolis Management Amendment Act, 1856 (19 & 20 Vict. c. 112), s. 9. Here a notice of the agenda for the second meeting, including the rescission of the first resolution, was sent to all the members of the council; but the large notice posted up for the information of the public did not say what the business was. At all events notice ought to have been given to the plaintiff.

On the facts the first resolution was right. The five years ending on the date of the abolition of the office are the proper period to be considered; and the use of the horse and carriage was an emolument: *Reg.* v. *Postmaster-General.* (1) Compensation is not to be calculated on the average of five years, but on the salary at the time when the office is abolished: ss. 2, 4, and 7 of the Superannuation Act of 1859. The scale of compensation is fixed by those sections, incorporated by s. 120, sub-s. 1, of the Local Government Act, 1888.

Manisty, K.C., and *R. Cunningham Glen*, for the defendants. There was no reason why notice of the second meeting should be given to the plaintiff. He had no right to be there: s. 120, sub-ss. 3 and 5, of the Local Government Act of 1888. Nor was there any obligation on the defendants to put up any public notice of the agenda of the meeting: s. 9 of the Metropolis Management Amendment Act of 1856.

[BUCKLEY J. The section means that public notice must be given of the place and time of holding the meeting, and of the special purposes thereof.]

The defendants had power to rescind the first resolution. The Metropolis Management Act of 1855, s. 57, presupposes a

(1) (1878) 3 Q. B. D. 428.

power to rescind resolutions. No doubt they could not rescind a resolution which created an obligation; but a retiring allowance is not really a specialty debt—it is only the creation of procedure. Sub-s. 6 of s. 120 of the Local Government Act, 1888, is nothing more than a means of enforcing payment. The real question is whether the resolution of August 1, 1901, was ultra vires of the council. The council exceeded their powers. Compensation has to be given for direct pecuniary loss: s. 120, sub-s. 1, of the Local Government Act of 1888; s. 30, sub-s. 2, of the London Government Act of 1899; s. 81, sub-ss. 1 and 7, of the Local Government Act of 1894. The council have given the plaintiff compensation for things outside the Acts.

The five years on which the compensation is to be calculated are the five years preceding the date of the passing of the London Government Act of 1899. The words "this Act" in sub-ss. 1 and 2 of s. 120 of the Local Government Act, 1888, mean "the London Government Act of 1899," namely, the Act to which the sub-sections are for the time being applied. Compensation is not to be assessed on the emoluments existing at the date of the abolition of the office, for fear lest the expiring vestry might raise the salary so as to secure larger compensation for the officer. The council assessed the plaintiff's compensation on a wrong basis, and the resolution was ultra vires. They calculated for the wrong period, and took into consideration the horse and carriage, which were not emoluments within the Acts. The fact that they did that does not prevent them from now saying that they are not emoluments.

There is nothing in any of these Acts of Parliament which interferes with the jurisdiction of this Court to review the decision of the council: *Upperton* v. *Ridley*. (1) The first resolution was ultra vires and void ab initio: *Ashbury Railway Carriage and Iron Co.* v. *Riche*. (2)

Danckwerts, K.C., in reply, referred to *Upperton* v. *Ridley*. (3)

Cur. adv. vult.

(1) [1901] 1 K. B. 384; [1903] A. C. 281.

(2) (1875) L. R. 7 H. L. 653.

(3) [1900] 1 Q. B. 680, 686.

1904

LIVINGSTONE v. WESTMINSTER CORPORATION.

BUCKLEY J. When the London Government Act, 1899, came into effect in November, 1900, the plaintiff, Mr. Livingstone, was an existing officer of the vestry of St. George's, Hanover Square, within s. 30, sub-s. 1, of that Act. Under a scheme made by virtue of s. 30, sub-s. 4, the Westminster City Council, which by virtue of the Act succeeded to the vestry, had power to agree with him as an existing officer of the vestry, that his acceptance of an office under the council for a temporary period should not prejudice any right to compensation to which he would otherwise have been entitled by or under the Act of 1899. The Act having, as I have said, come into operation in November, 1900, the council passed on January 31, 1901, a resolution for his temporary employment at a certain salary, without prejudice to the amount of his compensation for abolition of office. On May 9, 1901, the council resolved that his office be abolished as from May 31, 1901, and asked him to send in his claim for compensation. He did so, with the result that on August 1, 1901, the council passed a resolution granting him an annual allowance of 518*l.* 12*s.* 4*d.* The defendants say that the plaintiff in sending in his claim gave the particulars of a wrong period of five years. They say that, having regard to s. 120, sub-s. 2, of the Local Government Act of 1888, the proper five years would have been five years next before the passing of the Act of 1899. I do not agree; but it is immaterial, for the power of the council is, by virtue of s. 120, sub-s. 3, of the Act of 1888, a power to assess, not in respect of any particular period, but generally. If the plaintiff did select a wrong five years, the council should have asked him for another return. In fact, however, I believe it was they who named the particular five years for which he gave the particulars. At any rate, having his claim before them, the council assessed the compensation, and passed the resolution of August 1, 1901. The first question for decision is whether that resolution was valid. The only ground upon which it is attacked is that the maximum sum which could be voted as compensation being thirty-seven-sixtieths of his salary and emoluments, the sum, namely, 841*l.*, of which 518*l.* 12*s.* 4*d.* is thirty-seven-sixtieths, is alleged to

have been in excess of his salary and emoluments. The maximum is arrived at by reference to several Acts of Parliament, of which the later in each case introduces by reference some part of a former Act. The Act of 1899, s. 30, sub-s. 2, brings in s. 81, sub-s. 7, of the Local Government Act, 1894, which in turn brings in s. 120 of the Local Government Act, 1888. The concluding words of s. 120, sub-s. 1, of the Act of 1888 bring in s. 7 of the Superannuation Act, 1859, which in turn sends the reader back to s. 2 of the Act of 1859. The result is that s. 7 of the Act of 1859, coupled with s. 2 of the same Act, fixes as the maximum compensation which can be given in any case forty-sixtieths, or two-thirds of the officer's salary and emoluments; but, having regard to the length of this officer's service, the maximum in his case is thirty-seven-sixtieths of the salary and emoluments of his office. The facts which would have to be investigated in order to determine what the plaintiff's salary and emoluments were include the following. First, what emolument within the decision in *Reg.* v. *Postmaster-General* (1) the officer derived under a resolution of the vestry of August 19, 1875, by which, in the event of his finding a horse and carriage to assist him in his outdoor work, the vestry made him an allowance of 20*l.* a year, and provided fodder, stable-room, and attendance. Secondly, what "emolument," if any, the officer received in respect of a sum of 100*l.* which, by a resolution of the vestry of October 18, 1900, was voted for certain extra services. Thirdly, what emolument or salary (if any) was to be taken into account in respect of the officer's employment under the resolution of January 31, 1901 (which was passed before the resolution of May 9, 1901, abolishing the office), having regard to the fact that s. 120, sub-s. 1, of the Act of 1888 provides that regard is to be had to (inter alia) any additional emoluments "which he acquires by virtue of anything done in pursuance or in consequence of this Act"; and there may have been other matters to which I need not refer. The defendants contend that the question of fact, namely, what was the amount of the officer's salary and emoluments, is not one which was by the statute remitted to the council for determination, but that this Court

(1) 3 Q. B. D. 428.

1904

LIVINGSTONE v. WESTMINSTER CORPORATION.

Buckley J.

must in this action examine and determine it, and if this Court finds that 841*l.* is in excess of the salary and emoluments, the resolution of August, 1901, is ultra vires and wholly void. In my opinion that contention is not well founded. For this purpose the salary and emoluments in question are not the average salary and emoluments for any period of five years or any other time, but may be the ultimate salary and emoluments of the office. It was, I think, for the council to determine the question of fact what the salary and emoluments amounted to, and, if they have considered and arrived at a decision upon it, it is not competent to this Court to review their decision. If the decision was wrong it could have been made the subject of an appeal to the Treasury under s. 120, sub-s. 4, of the Act of 1888. If the council had plainly proceeded upon a wrong basis (if, for instance, they had by mistake taken the officer's salary to be 1000*l.* when it was only 500*l.*), I think, as presently stated, there might have been ground of defence to an action for more than the right amount. Or, if they had thus plainly gone wrong or if they had not fairly assessed the compensation in exercise of their powers, it may be that a mandamus would lie to call upon them to assess it anew. But, subject to the above, I think it is for the council and not for this Court to say what was the amount of the salary and emoluments of the office abolished. The defendants contend that, having regard to the concluding words of s. 120, sub-s. 1, of the Act of 1888, I must examine what was the true amount of the salary and emoluments, and if I find it to be less than 841*l.*, then the resolution of August, 1901, is ultra vires. This contention I think fails. Even assuming (which I think is not the case, as will presently appear) that those words could in any case give rise to a question of ultra vires, it is, I think, for the council, which has the jurisdiction if the question of fact be rightly determined, to determine the fact upon which its jurisdiction arises. If the council has jurisdiction within limits, it is for the council to determine the questions of fact, whose decision is necessary to determine the limits. An analogy, although not a perfect one, may be found in cases where the jurisdiction of a magistrate arises only if a particular fact be found to exist—say, for instance, jurisdiction under the game laws. The magistrate

may convict if the bird be a partridge, but not if it be a thrush. It is for the magistrate to decide whether it was a partridge or not. If jurisdiction arises if an offence charged be true in fact, it is for the person whose jurisdiction is invoked to determine the fact. In *Cave* v. *Mountain* (1) Tindal C.J. said: "There can be no doubt but that if a magistrate commit a party charged before him in a case where he has no jurisdiction he is liable to an action of trespass. But if the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the corpus delicti brought under investigation."

As instances I refer to *Brittain* v. *Kinnaird* (2), and in particular to the instructive judgment of Richardson J., and to *Reg.* v. *Bolton.* (3) So where there was authority to assess a duty on horse-dealers, the decision of the assessor that the party was a horse-dealer, however erroneous, could not be questioned in an action: *Allen* v. *Sharp.* (4) Here the amount of the salary and emoluments is a fact lying at the root of the decision, which is by the Act remitted to the council with a right of appeal to the Treasury. By s. 120, sub-s. 4, of the Act of 1888 the question of the compensation being "excessive" can be brought before the Treasury, and is to be determined by them. It is for the council or the Treasury, I think, and not for this Court, to determine this question of fact. Further, the concluding words of s. 120, sub-s. 1, of the Act of 1888 are not, I think, words whose effect is to render the action of the council ultra vires if they by their vote exceed the amount. They are at most words which might afford a ground of defence to an action for an amount exceeding the amount which can be given under the Act of 1859. If a statutory corporation having a capital of a certain amount issues capital in excess of that amount, the excess, but not the whole issue, is invalid. If the council, having statutory power to vote an officer compensation up to, say, 500*l.*, vote him 600*l.*, the vote will be

(1) (1840) 1 Man. & G. 257, 261; 56 R. R. 338, 342.
(2) 1 B. & B. 432; 21 R. R. 680.
(3) 1 Q. B. 66; 55 R. R. 209.
(4) 2 Ex. 352.

1904

LIVINGSTONE v. WESTMINSTER CORPORATION.

Buckley J.

good to the extent of 500*l.*, but bad as to the excess. The question of ultra vires does not, therefore, in my opinion arise, and for the reasons already assigned I think it is for the council to determine, acting of course fairly and honestly, the question of fact as to the amount of the salary and emoluments upon which thirty-seven-sixtieths is to be calculated. I think, therefore, that the resolution of August 1, 1901 was valid. But next it is said that on November 20, 1902, the council rescinded that resolution. The plaintiff argues that they had no power to do so. In my opinion the plaintiff is right. So soon as the resolution of August, 1901, was validly passed, there arose an obligation, which under s. 120, sub-s. 6, of the Act of 1888 was a specialty debt, enforceable as if the council had entered into a bond to pay the 518*l.* 12*s.* 4*d.* I find no power in the council to go back and relieve themselves from an obligation thus rendered binding upon them. The defendants refer to s. 57 of the Metropolis Management Act, 1855. That section is not empowering but restrictive. It provides only that a resolution shall not be revoked unless certain forms are observed and a particular majority obtained. It gives no power to revoke a resolution which has created rights as between the council and another person. Under these circumstances it is unnecessary to consider whether within s. 9 of the Metropolis Management Amendment Act, 1856, the meeting of November 20, 1902, was aptly summoned for the purpose.

In my judgment it is not for me to review the figure which the council on August 1, 1901, adopted. I think that that resolution is valid, that it was not open to rescission, and is now effectual. It results that the plaintiff is entitled to recover the sums which he claims. The defendants must pay the costs of the action.

The defendants' counsel suggested that a decision such as I have arrived at would leave the members of the council exposed to a continuous surcharge similar to that made at the audit of 1902. This is not so. The result of this decision is that the surcharge was wrong.

Solicitors: *Fowler & Co.; Allen & Son.*

H. C. R.

[IN THE COURT OF APPEAL.]

C. A. 1904 *April* 19.

GUARDIANS OF WEST HAM UNION, APPELLANTS *v.* GUARDIANS OF HOLBEACH UNION, RESPONDENTS.

Poor Law—Settlement and Removal—Illegitimate Child—Settlement by Residence—Irremovability—Residence by Child under Sixteen with Parent—Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 *Vict.* c. 61), *ss.* 34, 35.

Where an illegitimate child under sixteen resided with her mother in a parish for three years in such manner and under such circumstances in each of such years as would, in accordance with the statutes in that behalf, render her irremovable, and, subsequently to her attaining the age of sixteen, the question arose in what parish she was settled:—

Held, that by her residence as above mentioned she had acquired a settlement in the parish in which she had so resided.

Reg. v. *Elvet*, (1859) 2 E. & E. 266, and *Highworth and Swindon Union* v. *Westbury-on-Severn Union*, (1889) 14 App. Cas. 465, followed.

APPEAL against the judgment of a Divisional Court (Lord Alverstone C.J., Wills J., and Channell J.) (1), upon a case stated under the Summary Jurisdiction Acts by consent in an appeal to quarter sessions from an order of justices adjudging that the parish of West Ham, in the West Ham Union, was the place of the last legal settlement of one George Ernest Neep, a pauper.

The facts stated in the case were as follows: George Ernest Neep was the illegitimate child of Emma Neep, and was born in the Holbeach Union Workhouse on October 25, 1899. Emma Neep, the mother of the pauper, was the illegitimate child of Mary Ann Neep, and was born in the parish of Tilney St. Lawrence, in the Wisbech Union, on April 11, 1879. Mary Ann Neep married Alfred Frederick Chapman, at Tilney St. Lawrence, on December 23, 1881. From June 27, 1890, to September 7, 1893, Alfred Frederick Chapman resided in the parish of West Ham, in the West Ham Union, with his wife for a term of three years, in such manner and under such circumstances in each of such years as would, in accordance

(1) [1903] 2 K. B. 627.

C. A. 1904

WEST HAM UNION v. HOLBEACH UNION.

with the several statutes in that behalf, render him irremovable therefrom and settled therein. From September 7, 1893, Alfred Frederick Chapman continued to reside in the parish of West Ham, and was in receipt of relief from the West Ham Union until his death on September 8, 1894. His wife, Mary Ann Chapman, resided with him until his death. From September 8, 1894, Mary Ann Chapman (the widow of Alfred Frederick Chapman and the mother of Emma Neep) continued to reside in the parish of West Ham, and was in receipt of relief from the West Ham Union from September 8, 1894, until November 28, 1895, when she ceased to reside in the West Ham Union. She died in the Poplar Union Infirmary on October 14, 1896. From June 27, 1890, to July 28, 1893, Emma Neep (the mother of the pauper) resided with Alfred Frederick Chapman and her mother, Mary Ann Chapman, in the parish of West Ham, in the West Ham Union. On July 28, 1893, she went into service in the Poplar Union, and had since had no settled residence. On December 3, 1901, an order of justices was obtained on behalf of the respondents adjudging the pauper to be settled in the appellant union.

The appellants contended that the settlement of Emma Neep could not be ascertained without inquiring into the derivative settlement of her parent, Mary Ann Chapman, and that she must be deemed to be settled in the parish of Tilney St. Lawrence, where she was born.

The respondents contended that Emma Neep acquired a legal settlement in the parish of West Ham by reason of the residence there of Alfred Frederick Chapman and his wife as before mentioned, or by reason of the residence of Emma Neep for upwards of three years prior to July 28, 1893, in such manner and under such circumstances in each of such years as would, in accordance with the provisions of the several statutes in that behalf, render her irremovable therefrom.

The question for the opinion of the Court was whether, upon the facts above stated, Emma Neep acquired a settlement, under the Divided Parishes and Poor Law Amendment Act, 1876, ss. 34 and 35, in the parish of West Ham, in the West Ham Union.

The Divisional Court were of opinion that Emma Neep acquired an original settlement for herself in the West Ham Union by residence for three years, under s. 34 of the statute, and not merely a derivative settlement from her mother under s. 35. They therefore affirmed the order of the justices.

Montague Lush, K.C., and *W. J. Grubbe*, for the appellants. By s. 35 of the Divided Parishes and Poor Law Amendment Act, 1876, a legitimate child under sixteen is to take its parent's settlement up to that age, and to retain that settlement "until it shall acquire another," and "An illegitimate child shall retain the settlement of its mother until such child acquires another settlement. If any child in this section mentioned shall not have acquired a settlement for itself, or, being a female, shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born." It is contended that the effect of that section is that the pauper in this case must be deemed to be settled in Tilney St. Lawrence or perhaps in Holbeach; but it is really immaterial to the appellants where the pauper is settled, so long as he is not settled in West Ham. By reason of the provisions of s. 35 he can only be settled there, if his mother Emma acquired an independent settlement for herself by residence in that parish under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876. During the time that Emma Neep resided in West Ham she was a child under the age of sixteen residing with her mother Mary Ann Chapman. It is submitted that the word "person" in s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, means a person sui juris, and that it never was contemplated by the Act that an unemancipated child should acquire a settlement under the section by residence with its parent. Sect. 35 really fixes the age of emancipation at sixteen, and provides that a child shall take the parent's settlement up to that age, and shall retain that settlement until it "shall" acquire another. The language

C. A 1904

WEST HAM UNION v. HOLBEACH UNION.

of that part of the section is future, and shews that it is not contemplated that a child should be acquiring a settlement while deriving the parent's settlement before the age of sixteen. In giving judgment in the case of *Reigate Union* v. *Croydon Union* (1), and two other cases heard therewith in the House of Lords, in which the previous cases on the subject were reviewed, Lord Watson gave an exhaustive exposition of the operation of ss. 34 and 35 of the Act. He said, referring to the third clause of s. 35 (2): "The provisions of the clause have, in my opinion, no application to children under the age of sixteen, and do not qualify the preceding enactment of s. 35 to the effect that a legitimate, or that of 4 & 5 Will. 4 to the effect that an illegitimate, child shall continue to retain its parentage settlement until it has reached that age. The clause assumes that the children whose settlements are the subjects of inquiry are not unemancipated, but are paupers in their own right, and capable of acquiring a settlement for themselves." This passage clearly shews that his view was that, until the age of sixteen, a child retains the settlement of the parent, and is incapable of acquiring one for itself by residence under s. 34. Lord Macnaghten appears to have expressed a similar view.

The Court below appear to have thought that this case was governed by *Reg.* v. *Elvet.* (3) It is submitted that that is not so. So far as the judgments of Lord Campbell and Wightman J. in that case are concerned, they do not appear to shew that an unemancipated child could acquire for itself a status of irremovability independently of its parent, and they treat the status of irremovability in that case as derived by the pauper from her father, and retained by her after her emancipation upon his death. *Highworth and Swindon Union* v. *Westbury-on-Severn Union* (4) is distinguishable. There part of the period of three years' residence was subsequent to the pauper's attaining the age of sixteen; and it was held that the residence before and that after the age of sixteen might be added together for the purpose of the pauper's acquiring a settlement after she attained the age of sixteen. It was not held in that case that

(1) (1889) 14 App. Cas. 465.
(2) 14 App. Cas. at p. 484.
(3) 2 E. & E. 266.
(4) 14 App. Cas. 465.

a child could acquire a settlement by residence while under sixteen.

[They also cited *Manchester Overseers* v. *Ormskirk Union* (1); *West Derby Union* v. *Atcham Union* (2); *Mitford and Launditch Union* v. *Wayland Union* (3); *West Ham Union* v. *Bethnal Green*. (4)]

J. F. P. Rawlinson, K.C., and *C. B. Marriott*, for the respondents, were not called upon to argue.

COLLINS M.R. This case has raised somewhat intricate questions as to the settlement of a pauper; but the result of the argument addressed to us by the counsel for the appellants seems to me to be that it resolves itself into one comparatively simple point. The pauper is the illegitimate son of Emma Neep, and was born in the Holbeach Union Workhouse on October 25, 1899. The mother, Emma Neep, is the illegitimate child of Mary Ann Neep, and was born in the parish of Tilney St. Lawrence on April 11, 1879. The question really is whether Emma Neep acquired a settlement for herself by reason of three years' residence while she was under sixteen in the parish of West Ham, where her mother resided with a man named Chapman, whom she married after the birth of Emma Neep. It is stated in the case that from June 27, 1890, to September 7, 1893, Chapman resided in the parish of West Ham with his wife for the term of three years in such a manner and under such circumstances in each of such years as would, in accordance with the several statutes in that behalf, render him irremovable therefrom, and settled therein. The Divided Parishes and Poor Law Amendment Act, 1876, s. 34, deals with that state of facts. It provides that "where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise." The case of Chapman and

(1) (1890) 24 Q. B. D. 678.
(2) (1889) 24 Q. B. D. 117.
(3) (1889) 24 Q. B. D. 122.
(4) [1894] A. C. 230.

C. A. 1904

WEST HAM UNION v. HOLBEACH UNION.

Collins M.R.

his wife fell within that section. Then, with regard to Emma Neep, the child of the wife, she being an illegitimate child, her case is dealt with by s. 35 of the same Act. It is provided by that section that "an illegitimate child shall retain the settlement of its mother until such child acquires another settlement," and "if any child in this section mentioned shall not have acquired a settlement for itself, or, being a female, shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born." Therefore, if the pauper's mother, Emma Neep, acquired for herself a settlement by residence in the parish of West Ham, the pauper takes a settlement in that parish, but it was contended that otherwise, by reason of the provisions of s. 35, he does not. The only difficulty in the way of the contention that Emma Neep, the pauper's mother, acquired a settlement in West Ham by three years' residence in that parish, under such circumstances as would render her irremovable, appears to be that that residence was while she was under the age of sixteen. The question therefore appears to be whether a person can, under s. 34 of the Act, acquire a settlement by residence while under the age of sixteen.

It has been contended by the counsel for the appellants that s. 34 only deals with emancipated persons, and that the residence in a parish of persons under sixteen, an age fixed for the first time by the Act, cannot have the result of conferring on them a settlement, whether before or after that age. I think we are relieved of the necessity for deciding this question on general principles, because it appears to me that it has been really already decided by authority in the case of *Reg.* v. *Elvet.* (1) In that case the head-note is as follows: "In 1835 the pauper's father and mother went to reside at E., and they both continued to reside there till July, 1847. The pauper was born there in January, 1844. In July, 1847, the mother became chargeable to E. as a lunatic, and was removed to an

(1) 2 E. & E. 266.

asylum at B. In September, 1849, an order was made by justices, adjudging the mother's settlement to be in S. After remaining in the asylum, at the charge of S., for several years, she was removed to the workhouse in S., and was maintained there by S. as a lunatic, till her death in October, 1858. The pauper continued to reside with her father in E. from her birth till his death in December, 1857; and after his death she remained there till February, 1858, when she became chargeable to E. In December, 1858, an order was made for her removal to S., which was quashed, on appeal, by an order of sessions:—*Held*, confirming the order of sessions, that the pauper was by statute 9 & 10 Vict. c. 66 irremovable from E.; for that the relief afforded to her father by the maintenance of her mother did not deprive him of the status of irremovability from E., which he had previously acquired; that that status was communicated to the pauper, and that she retained it at the date of the order of removal." The judgments are very short, and I think I had better read them. Lord Campbell C.J. said: "I am of opinion that the pauper, by her residence with her father, acquired the status of irremovability. This status, which the father had acquired before he received relief through his wife, was not taken from him by such subsequent receipt of relief; and, at the time that the order for her removal was made, the pauper continued irremovable, her mother being then dead." Wightman J. said: "By her residence with her father the pauper became irremovable, and, as she continued to reside in the respondent township down to the time that the order for her removal was made, and her mother had died before that time, she was then still irremovable." Erle J. said: "The fact that the father of the pauper received relief after he had acquired the status of irremovability does not appear to me to affect the question. When her father died, the pauper had acquired an independent status of irremovability, which she retained down to the time that the order of removal was made." The pauper in that case was not fourteen at the time of her father's death, and yet it was held that she had acquired the status of irremovability by residence in the parish with her father. It was contended by the counsel for the appellants that the status of

1904

WEST HAM UNION v. HOLBEACH UNION.

Collins M.R.

irremovability so referred to was one derived from the father, and it was not meant that the child could be acquiring an independent status of irremovability by residence during the father's lifetime. That contention may possibly be consistent with the language of the judgments of Lord Campbell C.J. and Wightman J. looked at by themselves, but it is not consistent with the judgment of Erle J., who distinctly says that the pauper had acquired an independent status of irremovability when the father died. It seems to me that his judgment really gave the key to the whole situation, and that the other judges must have intended to decide on the same grounds. The case therefore appears to be an authority that the residence of a child in a parish, with its parent, while unemancipated—for it is impossible to suggest that the pauper in that case was emancipated during her father's lifetime—may be relied on as conferring on that child after emancipation the status of irremovability. Then, what was the view taken of this question in the House of Lords in the case of *Highworth and Swindon Union* v. *Westbury-on-Severn Union*? (1) Lord Halsbury L.C. said (2): "The second case, that of the *Highworth and Swindon Union* v. *Westbury-on-Severn Union* (1), I think, is concluded by the authority of Lord Campbell and Wightman and Erle JJ., which I should be very sorry to see disturbed. I agree with Stephen and Charles JJ. that the case of *Reg.* v. *Elvet* (3) determines, and rightly determines, the question in debate. The pauper had by more than the necessary period of residence acquired a status of irremovability, and so was 'settled' in the parish of Rhydgwern. It is true that during a part of that period she was under sixteen years of age, and it is true that, if it be assumed, as it was by the Court of Appeal, that unemancipated residence will not suffice, then she had not accomplished the necessary period of emancipated residence. The statute knows no such distinction. It makes the emancipated and unemancipated equally irremovable, and, if so, the periods of emancipated and unemancipated residence may be put together." It will be observed that Lord Halsbury treats

(1) 14 App. Cas. 465. (2) 14 App. Cas. at p. 479.
(3) 2 E. & E. 266.

all the judges in *Reg.* v. *Elvet* (1) as having decided the same point. Erle J. dealt with it in express terms, but the Lord Chancellor treats them all as having decided the case on that point. We are asked to assume that Lord Macnaghten and Lord Watson decided differently from the Lord Chancellor in the House of Lords. But, when one comes to sift what they said, it appears to me clear that Lord Macnaghten said nothing which conflicts with what the Lord Chancellor had said, but on the contrary adopted the same line of argument as he had adopted. He treats it as following from the decision in *Reg.* v. *Elvet* (1) that the residence of a person while unemancipated is capable of forming the foundation of a settlement; he puts together the period of the pauper's residence while unemancipated and that of her residence while emancipated, and says nothing from which it can be implied that, if the whole period of residence had been prior to the pauper's attaining the age of sixteen, it would not have been equally effective, on the question arising after she had attained that age, whether by that residence she had acquired a settlement. But the counsel for the appellants strongly pressed the suggestion that Lord Watson's judgment, which they put forward as the governing judgment in the case, decides something different. When one comes to scrutinize that judgment closely, although there are, no doubt, some passages which require careful consideration with the context in order to ascertain their meaning, I think that, when they are so considered, it appears that he did not mean to say anything different from what the Lord Chancellor had said. He says (2): "I have been unable to find in s. 34 any provision, express or implied, to the effect that an emancipated child claiming a settlement under its provisions is not to have the benefit of residence whilst it was under the age of sixteen. The only provision having a bearing upon the point is to be found in s. 35, which enacts that until emancipation the child 'shall retain' the settlement of its father or widowed mother. That provision does not necessarily imply that on attaining sixteen the child is not to have the benefit of previous residence; but, even if it pointed to that result, I do not think that any mere implication derivable from it can be permitted

(1) 2 E. & E. 266. (2) 14 App. Cas. 486.

C. A. 1904

WEST HAM UNION v. HOLBEACH UNION.

Collins M.R.

to override the express enactment of s. 34. The only test of residence sufficient to give 'any person' a settlement under that section is that it shall be such as would, 'in accordance with the several statutes in that behalf, render him irremovable'; and the case of *Reg.* v. *Elvet* (1) is a clear authority to the effect that the pauper's residence under sixteen, coupled with her residence after she attained that age, did render her irremovable in accordance with these statutes." That passage contains a distinct affirmance by Lord Watson of the same view as is expressed by the Lord Chancellor and Lord Macnaghten. It is contended that in an earlier passage of his judgment (2) Lord Watson laid down the law in a manner inconsistent with that view. He there says, referring to the provisions of the third clause of s. 35: "The provisions of the clause have, in my opinion, no application to children under the age of sixteen, and do not qualify the preceding enactment of s. 35 to the effect that a legitimate, or that of 4 & 5 Will. 4 to the effect that an illegitimate, child shall continue to retain its parentage settlement until it has reached that age. The clause assumes that the children whose settlements are the subject of inquiry are not unemancipated, but are paupers in their own right, and capable of acquiring a settlement for themselves." It appears to me that, as pointed out by Romer L.J., Lord Watson was there referring to the condition of unemancipated persons during the period while they are unemancipated, and not to the effect of residence by them during that period after they have become emancipated. We have, therefore, a unanimous affirmation in the House of Lords of the principle laid down in *Reg.* v. *Elvet* (1), which is clearly in point in the present case, namely, that the residence of a person before emancipation is available for the purpose of conferring a status of irremovability, and consequently a settlement. The mother of the pauper in this case completed a period of three years' residence in the parish of West Ham under such conditions as to render her irremovable, while she was under sixteen; and, now she is of full age, she is entitled, in accordance with the principle established in the House of

(1) 2 E. & E. 266. (2) 14 App. Cas. 484.

Lords, to claim the benefit of that residence as conferring a settlement. The only difference I can see between this case and *Reg.* v. *Elvet* (1) is that in that case the pauper continued to reside in the parish after her father's death, when she might be considered to be emancipated; but the principle on which it was decided, namely, that residence before emancipation may be taken into account as conferring a status of irremovability, applies, as it appears to me, to the present case. For these reasons I think the appeal must be dismissed.

ROMER L.J. Doing my best to guide myself by the authorities, as they stand since the decisions in the three cases in the House of Lords to which we have been referred, I have come to the same conclusion as the Master of the Rolls. I think this case is governed by the second of those decisions, namely, that in *Highworth and Swindon Union* v. *Westbury-on-Severn Union.* (2) The principle which appears to be there laid down is that a child, after attaining the age of sixteen, may claim to have acquired a settlement by reason of residence for three years in a parish, before attaining that age. The Lord Chancellor, as pointed out by the Master of the Rolls, clearly states that the section makes no distinction between emancipated residence and unemancipated residence by a child under sixteen; and I do not think that the other learned Law Lords differed from that view. They all base their decision, as it appears to me, on *Reg.* v. *Elvet* (1), as being in point to the case before them. I will only add that I think there is no foundation for the suggestion that Lord Watson differed from the view we are expressing, by reason of what he said in the fourth proposition enunciated in his judgment (3), where he lays it down that the effect of s. 35 is "in all cases where the parents' settlement was itself derivative, to throw the children of either class," i.e., whether legitimate or illegitimate, "as soon as they attain the age of sixteen, upon their own birth settlement, until they acquire another." He was stating the proposition shortly, and he naturally in so doing used expressions

(1) 2 E. & E. 266. (2) 14 App. Cas. 465, at p. 472.
(3) 14 App. Cas. 484.

C. A. 1904

WEST HAM UNION v. HOLBEACH UNION.

pointing to the future. I do not think that he meant to imply that, after a child's attaining the age of sixteen, reliance could not be placed on a residence which took place before his attaining that age, for the purpose of shewing that he had acquired a settlement.

MATHEW L.J. I agree. I think the judgment of the Divisional Court is in accordance with the language of the Act and the decision in *Reg.* v. *Elvet.* (1) It was argued that the mother of the pauper, Emma Neep, could not be deemed to have acquired a settlement by residence in West Ham, while under sixteen, because s. 34 must be confined to emancipated persons. There is nothing in the language of the section to justify that contention; and the Lord Chancellor in *Highworth and Swindon Union* v. *Westbury-on-Severn Union* (2) says that there is no distinction for this purpose between an emancipated and an unemancipated person. When s. 35 is looked at, its language does not appear to be consistent with the contention that a child cannot under s. 34 acquire a settlement by residence while under sixteen; for, after dealing with the case of a legitimate child under sixteen, s. 35 provides that "an illegitimate child shall retain the settlement of its mother, until such child acquires another settlement," and that, "if any child in this section mentioned," which would include a child under sixteen, "shall not have acquired a settlement for itself and it cannot be shewn what settlement such child derived from the parent without inquiring into the derivative settlement of such parent, such child shall be deemed to be settled in the parish in which he or she was born." This language seems to make it clear that the section contemplates the possibility of a child under sixteen acquiring a settlement for itself. The fact that in this case the settlement of Emma Neep and that of her mother happen to be in the same parish, the one however being by residence and the other derivative, does not appear to constitute any reason under the Act why effect should not be given to the settlement acquired by the former through residence. The

(1) 2 E. & E. 266. (2) 14 App. Cas. 465.

point in this case appears really to be concluded by the cases to which I have referred. The result of those decisions is that, for the purpose of acquiring a settlement, residence before emancipation can be added to residence after emancipation. If so, why should not the settlement be acquired where the whole of the necessary period of residence was before emancipation? I can see no reason for distinguishing between the two cases.

C. A. 1904

WEST HAM UNION v. HOLBEACH UNION.

Mathew L.J.

Appeal dismissed.

Solicitor for appellants: *F. E. Hilleary.*

Solicitors for respondents: *Callard & Vulliamy, for Richard P. Mossop, Holbeach.*

E. L.

In re BROWNE. *Ex parte* MARTINGELL.

1904 *Feb.* 29.

Bankruptcy—Gaming Debt—New Consideration—Withdrawal of Letter to Debtor's Club—Bankruptcy of Debtor—Provable Debt.

After an action to recover a gaming debt had been dismissed, the creditor wrote to the committee of the debtor's club complaining of his conduct in not paying his debts of honour. The debtor, in consideration of this letter of complaint being withdrawn, gave the creditor bills in satisfaction of the debt. Before the bills were paid the debtor became bankrupt:—

Held, that the bills were given for a good consideration, and that the creditor could prove for the amount due thereon.

THIS was an appeal by a creditor against the rejection of his proof by the trustee under these circumstances.

The debtor and one Martingell were members of the Eccentric Club, and by the rules of the club the members were re-elected every year. Martingell was a turf commission agent. During 1900 he had considerable betting transactions with the debtor, and by the end of that year some 800*l.* was due to him in respect of bets which he had made and paid for and on behalf of the debtor. Martingell having brought an action for the 800*l.* in the King's Bench Division, the debtor successfully pleaded the Gaming Act, 1892, and the action was dismissed with costs. Thereupon, in September, 1902, Martingell wrote to the secretary of the Eccentric Club

1904

BROWNE, *In re.* MARTINGELL, *Ex parte.*

complaining of the debtor's conduct in not paying his debts of honour, with the result that the debtor was not re-elected a member on January 1, 1903, when the annual re-election of members took place. Negotiations then ensued between the debtor and Martingell, and it was arranged between them that, in consideration of Martingell writing to the secretary of the club and withdrawing his letter of complaint of September, 1902, the debtor should pay him 100*l.* in cash and accept four bills of 100*l.* each, in his favour. This arrangement was carried out on January 12, 1903, but the debtor was not re-elected a member of the club.

The first of the four bills was dishonoured at maturity, and Martingell brought an action upon it in September, 1903, which was undefended, and in due course he signed judgment on September 29, 1903.

Before the second bill fell due a receiving order was made against the debtor, and adjudication followed. Martingell carried in a proof in the bankruptcy for 409*l.* 11*s.* 10*d.*, based on the judgment of September, 1903, and the three other bills. The trustee rejected the proof on the ground that the four bills of January, 1903, were given for an illegal consideration: against this rejection Martingell now appealed.

Reed, K.C., and *H. Simmons*, for Martingell. The onus is on the trustee to shew that an illegal consideration was given for these bills. The transaction of January 12 created a new debt for a good consideration. The old debt was gone by reason of the judgment in the King's Bench action. Then the debtor pays 100*l.* and accepts four bills of 100*l.* each, and receives in exchange the plaintiff's letter to the club withdrawing his previous letter of complaint. That was a legal transaction for a good consideration free from all taint under the Gaming Acts.

Muir Mackenzie, for the trustee. The question is not between the judgment creditor and the debtor, but whether the judgment creditor has a debt provable in the bankruptcy. The Court can go behind the compromise and ascertain what was the real consideration for the debt: *In re Hawkins*. (1)

(1) [1895] 1 Q. B. 404.

The compromise was intended to cover an arrangement to pay the old gaming debt, and the bills were really given in satisfaction and by way of settlement of the old debt of 800*l.* The case is not unlike that of *Re Deerhurst.* (1)

BUCKLEY J. In this case the trustee has rejected this creditor's proof on the ground that the four bills on which it is based were given for an illegal consideration, and that is the only point I have to decide. The facts are these. The debtor owed the creditor in respect of betting transactions some 800*l.* It was not a legal debt, but what is called a debt of honour. An action brought by the creditor to recover that 800*l.* was dismissed in 1902. That was a decision that there was no debt, and that matter was at an end. Afterwards a new consideration was given for a new sum. The creditor had written a letter to the committee of the debtor's club complaining of the debtor's conduct in not paying his debts of honour. The debtor wished to have that letter withdrawn, and in January, 1903, he gave these four bills in exchange for a letter addressed to the club and signed by the creditor, withdrawing the previous letter of complaint. In my opinion that was a wholly new transaction, and distinguishes this case from *Re Deerhurst.* (1) The circumstances of that case were the opposite to this. There the judgment creditor was claiming to prove on a judgment which he had obtained in an action brought on the gaming debt, which, by arrangement, was not defended. In the present case the question of the existence of any debt was under the circumstances entirely put an end to. The bills were given for an altogether new consideration, which was not an illegal consideration. They were given, not to pay the gaming debt, but, as Romilly M.R. said in *Bubb* v. *Yelverton* (2), to avoid the consequences of not having paid it. The rejection of the proof must be set aside; but this must be without prejudice to any other objection that the trustee may be advised to take.

Solicitors: *J. Joshua Hands; Andrew, Wood & Co.*

(1) (1891) 8 Morr. 97.

(2) (1870) L. R. 9 Eq. 471.

H. L. F.

1904

March 8, 9.

GOERZ & CO. *v.* BELL.

Revenue—Income Tax—Residence—"Person residing in the United Kingdom"—Company registered Abroad—Head Office and Directing Power in United Kingdom—Income Tax Act, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sched. D.*

A company registered abroad, but having its head office in London, where the meetings of the directors are held and where the directing and controlling power is exercised, is assessable to income tax on the whole of its profits as "a person residing in the United Kingdom" within the meaning of s. 2, Sched. D, of the Income Tax Act, 1853.

CASE stated by the Commissioners of Income Tax for the City of London upon an appeal against an income tax assessment.

The appellant company was registered in December, 1897, as a joint stock company at Pretoria, in the then South African Republic, according to the laws then subsisting in that Republic; it had never been registered in the United Kingdom. From the articles of association it appeared that the objects for which the company was formed were (inter alia) to take over the business of a company limited by German law bearing the same name, to carry on the business of merchants, dealers in shares, stocks, and other securities, financial and general agents, miners and mining in all its branches, and generally to carry on and undertake any business, transaction, or operation commonly carried on by capitalists, promoters, and financiers, contractors for public and other works, or agents; to acquire lands, mining and other properties, and real and personal property of every kind in South Africa and elsewhere, and to deal with; develop, and turn them to account; to promote any companies, syndicates, or partnerships of all kinds, and to promote and aid in the promotion of measures for the protection of the mining industry in the South African Republic and elsewhere, and to promote or oppose legislative and other measures affecting that industry. It was provided that the head office of the company should be "either in London, or elsewhere on the Continent of Europe, or in Johannesburg in

the South African Republic, or at such other place elsewhere, with such branch or branches in this Republic and elsewhere, as the directors may from time to time determine"; that the meetings of the company, until otherwise determined by the company or by the board of directors, should be held in Johannesburg; that the directors might reside in the South African Republic, in Europe, or elsewhere, and that the directors might meet for the despatch of business in Berlin, London, Johannesburg, Paris, or elsewhere.

The business of the company consisted in the purchase and prospecting of lands with mining possibilities, or the obtaining of options over them, with a view to the formation and flotation of companies for the purpose of working the same; the formation and flotation of such subsidiary companies either alone or in participation with others, and the making of a market for the shares of the subsidiary companies in London, Berlin, Paris, and Johannesburg, and dealing in and selling the shares; also in dealing in other shares, principally of South African companies, including the sale and realization of the shares and other assets taken over from the German company. The working capital of the subsidiary companies was provided by the appellants either alone or in conjunction with others as a syndicate in agreed proportions, and the nominal share capital of the subsidiary companies was then either taken as a whole by the appellants or distributed pro ratâ among the members of the syndicate, the working capital being almost invariably subscribed by the syndicate to enable them to be floated fully equipped. The syndicates usually consisted of capitalists and financiers carrying on business in Europe and South Africa. No prospectuses were issued by the subsidiary companies, but a market was made and the shares then distributed and dealt in, and gradually realized on the stock markets of London, Paris, Berlin, and Johannesburg. The profits made by the appellants were directly obtained by the sale and realization of shares in the subsidiary companies, but additional profit was made on ordinary purchases and sales of shares in various other companies, additional sources of profit being interest on money lent, dividends on shares held, agency

1904

GOERZ & Co. v. BELL.

fees from other companies, and the like. The bulk of the appellants' capital was invested in South African shares and in mining properties in the Witwatersrand district of South Africa, the interests of the appellants outside of South Africa only standing at about 50,000*l.*, half of this amount being invested in the United States and Mexico, and half in shares of mining companies in Western Australia and Chili. An option for the purchase and working of certain lands and interests in British India was acquired, but not during the year of assessment, and prospecting operations during the year of assessment were carried on in Western Australia, but, after prospecting the lands and interests, the option and operations were not carried out. On December 31, 1899, the value of the shares and debentures in other companies held by the appellants amounted to 719,365*l.* 9*s.* 8*d.*; the value of claim holdings, participations, and interests to 224,395*l.* 15*s.* 1*d.*; the value of the temporary advances against securities (including shares and stocks taken in) to 144,520*l.* 6*s.* 3*d.*, the advances made in London amounting to 37,900*l.* 9*s.* 3*d.*, and in Paris to 106,619*l.* 17*s.*; the amount of cash on deposit accounts and in hand was 326,884*l.* 19*s.* 4*d.*, of which 171,819*l.* 11*s.* 10*d.* was held in London, 123,301*l.* 19*s.* 3*d.* in Berlin, 9205*l.* 19*s.* 1*d.* in Paris, and 22,557*l.* 9*s.* 2*d.* in Johannesburg.

The transaction of the affairs of the appellants was effected in the following manner. The first general meeting of the company was held in 1899 at the appellants' office in Johannesburg, from which date to the end of the year of assessment no further general meeting was held by reason of the war in South Africa. The second general meeting was held in London in June, 1901, subsequent to the year of assessment. As regards the meetings of the directors, the directors' minute-book kept in London, which was the only minute-book of the appellant company, was produced in evidence, and contained a great number of items and minutes of resolutions relating to the affairs of the company, which, in the opinion of the Commissioners, shewed that almost every transaction of importance affecting the management, control, and direction of the company was dealt with, controlled, and decided at the board

meetings of the directors in London. A considerable number of important matters requiring local management and dealing were carried out by the managing director in Johannesburg on behalf of the board under powers delegated by the board in London, and under powers of attorney sealed and executed by the board in London. A copy of the minutes of the board meetings in London was forwarded after each meeting to Johannesburg; no other minute-book was kept at Johannesburg.

With regard to the staff, the chairman and three directors were resident in England, four directors (who were permanent directors nominated by the vendors) were resident in Germany, one in Paris, and one in the South African Republic; the directors resident in Germany and Paris attended the board meetings in London. In 1899, the year of assessment, there was one managing director of the company, Mr. Adolf Goerz, who was resident in London, and another gentleman was appointed managing director in Johannesburg and resided there. The board also appointed two managers in London, two in Johannesburg, one in Paris, and one in Berlin. The Johannesburg staff numbered twenty-five, the London staff twenty-six, the Berlin staff thirteen, and the Paris staff nine. All the meetings of the directors took place at the company's offices in the City of London, where the London staff was located, the directors having held monthly meetings there since February 1, 1898; the sole exception to this rule was that one meeting was held at Paris in 1901, which meeting was expressed in the minute-book to be called in furtherance of "the idea to hold meetings on the Continent instead of in London, say once a year."

The accounts of the Johannesburg, Paris, and Berlin offices were brought to London, where the full balance-sheets and profit and loss accounts of the company were made up and audited, and where alone the full accounts of the company were kept. In the preparation of the accounts it was usual for the Berlin office accounts to be audited in Berlin, and for those and the Paris office accounts to be brought to London; the Johannesburg office accounts were audited in Johannesburg;

1904

GOERZ & CO. v. BELL.

and the whole of these branch accounts were then incorporated in the full accounts which were made up and audited in London. The complete accounts, with a directors' report, were prepared, approved, and passed in London by the board of directors, in the first instance in English, and were then translated into French and German for the use of the shareholders resident in France and Germany.

The dividends were fixed and authorized by resolutions of the directors at meetings held in London for that purpose, and the dividend warrants in respect of 801,524 registered shares were also issued by them from London. The coupons on bearer shares were paid in 1899, as to 52,294 shares in Berlin and Paris, and as to 11,182 shares in London, and eventually were brought to account in London.

The appellants contended that the appellant company should be assessed as a person not resident within the United Kingdom drawing profit from a trade exercised in the United Kingdom, and on such profits only; they relied on *Attorney-General* v. *Alexander*. (1)

The Commissioners, after hearing evidence, found as facts, (1.) that the trade and business of the company constituted one trade or business, and was carried on and exercised by the appellants within the United Kingdom at their London office; and (2.) that the head and seat and directing powers of the affairs of the appellant company were at the office of the company in London, from whence the whole of the operations of the company both in the United Kingdom and elsewhere were controlled and directed.

The Commissioners having considered the cases of *Cesena Sulphur Co.* v. *Nicholson* (2), *Calcutta Jute Mills Co.* v. *Nicholson* (3), *San Paulo (Brazilian) Ry. Co.* v. *Carter* (4), *Attorney-General* v. *Alexander* (1), and other cases, determined that the appellant company was a person residing in the United Kingdom, and liable as such to be assessed under s. 2 of the Income Tax Act, 1853, Sched. D, 1st paragraph, on the whole of the annual profits or gains arising or accruing from any

(1) (1874) L. R. 10 Ex. 20.
(2) (1876) 1 Ex. D. 428.
(3) (1876) 1 Ex. D. 428.
(4) [1896] A. C. 31.

trade, whether the same shall be respectively carried on in the United Kingdom or elsewhere, and accordingly confirmed the assessment in the sum of 142,429*l.* (1)

Asquith, K.C. (*Scrutton*, K.C., and *J. R. Atkin* with him), for the appellants. The appellant company is not in law resident in the United Kingdom within the meaning of Sched. D of the Income Tax Act, 1853. A company registered abroad and not in the United Kingdom has never before been held to be resident in the United Kingdom for income tax purposes. The question being what residence means as used in the Income Tax Acts, definitions of that word drawn from other branches of the law are not relevant: *Ex parte Breull.* (2) Paragraph 2 of Sched. D contemplates that a trade may be exercised in the United Kingdom by a non-resident; therefore the fact that a trade is carried on here is not a conclusive test of residence; the owner of the business may be non-resident, although the controlling power is in this country. Shortly stated, the material facts in the present case are: (1.) the company was registered abroad and not here; (2.) the annual meetings of the shareholders, who are the ultimate controlling body, were held in Johannesburg; (3.) the company's capital was invested in South Africa; (4.) there are four distinct centres, in four different countries, where the business is carried on; that aggregation of facts

(1) By s. 2, Sched. D, of the Income Tax Act, 1853, the duties are made payable "For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, and to be charged for every twenty shillings of the annual amount of such profits and gains:

"And for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom, and to be charged for every twenty shillings of the annual amount of such profits and gains:"

(2) (1880) 16 Ch. D. 484.

1904

GOERZ & CO. v. BELL.

does not constitute residence in the United Kingdom. In *Attorney-General* v. *Alexander* (1) a bank, having its seat at Constantinople, took over and carried on a banking business in London, where the general meetings were held and dividends declared; but the bank was held not to be resident in the United Kingdom, and to be chargeable only in respect of the profits from the business carried on in London.

[CHANNELL J. That case would be in your favour but for the express provision in the statutes of the bank that its seat should be at Constantinople.]

In *Wingate & Co.* v. *Inland Revenue* (2) a shipping company was incorporated under Norwegian law with a registered office at Christiania, where the books of the company were kept, but the whole of the chartering was done, and the whole of the accounts were kept, in Glasgow; it was held that the company was resident abroad, although, as its profits were derived from trade carried on in this country, it was liable to assessment. No doubt where a company is registered in England and holds its general meetings here, although the practical management of its trading operations may be in the hands of agents or directors abroad, it is resident in the United Kingdom, as was held in *Cesena Sulphur Co.* v. *Nicholson* (3) and *Calcutta Jute Mills Co.* v. *Nicholson* (4); but those cases tend rather to shew that registration and the holding of the general meetings of the shareholders are the tests of residence. The case of *San Paulo (Brazilian) Ry. Co.* v. *Carter* (5) is not material on the present question, for there was in that case an admission that the company was an English company resident in England. There is no case but *Wingate & Co.* v. *Inland Revenue* (2) where a company registered abroad has been held to carry on the whole of its business in the United Kingdom so as to be taxable here; and even in that case it was held to be resident abroad. [He also cited *Kodak, Ld.* v. *Clark* (6); *Grainger & Son* v. *Gough* (7); *Sulley* v. *Attorney-General.* (8)]

(1) L. R. 10 Ex. 20.
(2) (1897) 24 R. 939.
(3) 1 Ex. D. 428.
(4) 1 Ex. D. 428.
(5) [1896] A. C. 31.
(6) [1902] 2 K. B. 450.
(7) [1896] A. C. 325.
(8) (1860) 5 H. & N. 711.

1904

GOERZ & CO. v. BELL.

Sir R. B. Finlay, A.-G. (*Rowlatt* with him), for the respondent. The appellant company was resident in the United Kingdom. A company does not necessarily reside in the country where it is registered; registration is only one fact to be considered with all the other facts of the case. Practically the residence of a company depends on where in substance it carries on its business; there can be no other test, for the ordinary criteria in the case of persons are not applicable to the case of a company. The question may be complicated by a clause in a company's charter, as in *Attorney-General* v. *Alexander* (1), by which the seat of a corporation is to be in a certain country, so that it would be ultra vires to have it elsewhere; but where there is no such fetter, the carrying on and direction of the business must be the test to apply. The place where the business is carried on depends on where is the centre of the business, and that, in the absence of a binding provision in the charter or articles, must be the test of a company's residence. The cases of *Cesena Sulphur Co.* v. *Nicholson* (2) and *Calcutta Jute Mills Co.* v. *Nicholson* (3) are to a great extent in favour of the contention of the respondent, for they shew that a company is resident where its place of incorporation is and where its governing body is to be found. In *London Bank of Mexico* v. *Apthorpe* (4) a banking company registered in the United Kingdom, where its directors and shareholders met and whence its affairs were directed and controlled, and also carrying on business abroad, was held chargeable on its whole profits, whether remitted to this country or not; and the same was held in *San Paulo (Brazilian) Ry. Co.* v. *Carter* (5), which was the case of an English company for making and working a railway in Brazil, which was admitted to be resident in England, where the control and direction of the business was exercised.

[CHANNELL J. No doubt the decision in the last case shews that the business of the appellants is carried on in this country, where the directing centre is, but it does not shew that this company is resident in England.]

(1) L. R. 10 Ex. 20.
(2) 1 Ex. D. 428.
(3) 1 Ex. D. 428.
(4) [1891] 2 Q. B. 378.
(5) [1896] A. C. 31.

F

1904

GOERZ & CO. v. BELL.

It was not necessary in that case to deal with the question of the company's residence, as it was admitted. Even if the appellant company is not resident in the United Kingdom, they are liable to pay income tax on the whole of their profits under the second paragraph of Sched. D.

Asquith, K.C., in reply. In *Wingate & Co.* v. *Inland Revenue* (1) the Court must be taken to have found that the business was carried on in Glasgow and nowhere else, and yet it was held that the company was not resident in Scotland. Without overruling that decision it is impossible to adopt the Attorney-General's sole criterion of residence—that of the place where the company's business is carried on. And the case of *San Paulo* (*Brazilian*) *Ry. Co.* v. *Carter* (2) is not an authority against the appellants, for there it was unnecessary to consider whether the business was wholly carried on here, or whether its head and directing centre were here; it was only necessary to consider whether any part of the business was carried on in this country and not abroad. Sched. D. deals with trades "carried on" and "exercised," not "controlled" or "directed," in the United Kingdom; and many of the operations of the appellants are "carried on" or "exercised" abroad.

CHANNELL J. I am of opinion that this appeal should be dismissed. In certain views of the case there are two points, but the main point is whether this company is resident in the United Kingdom for the purpose of the Income Tax Acts. The appellants' counsel drew my attention during the argument to a dictum of James L.J. in *Ex parte Breull* (3), in which it is pointed out that a word like "residence" might be, and probably was, used in different statutes with different meanings, and that (for example) that which constitutes residence for registration purposes might not necessarily amount to residence for the purpose of assessment to the income tax. I entirely accept that view, and I must therefore look at the Income Tax Act, which is the particular Act which I have to construe, and consider the meaning of the expression "residence in the United Kingdom" as there used. The first clause

(1) 24 R. 939. (2) [1896] A. C. 31.
(3) 16 Ch. D. 484.

provides that a person residing in the United Kingdom is to be assessable to income tax to the whole extent of the profits and gains arising from any profession, trade, employment or vocation exercised by him, whether carried on in the United Kingdom or elsewhere, that is to say, whether it is carried on entirely in the United Kingdom or entirely elsewhere, or partly in the United Kingdom and partly elsewhere. On the other hand, a person who is not resident in the United Kingdom is only liable (speaking roughly and not with exact precision) to the extent of the trade that he does in the United Kingdom. The reason for this seems to be that a person who is resident in the United Kingdom takes the benefit of the government of the country, of the security afforded to his life and liberty, and of the opportunity of conducting his business in the way in which the government of a settled and civilized country enables it to be conducted; he accordingly has to pay, like other inhabitants of the country, his full share towards the expenses of that government. On the other hand, if he does not reside in the country and therefore does not get the full benefit of the expenses incurred in governing the country, he does not have to pay income tax upon his full income like persons resident in the country, but only pays what I may style a toll in respect of the use which he makes of the government of the country by coming into the country and doing business here. That seems to be the policy of the Act, and it assists one in understanding how to apply it in the case of individuals, but does not throw much light on the question whether there can be said to be residence in the United Kingdom on the part of a company, which in one sense has no physical existence and cannot be said to dwell in the ordinary sense of the word in any particular place; I think, however, that some little assistance is to be derived from it. The company does get a certain amount of benefit from the government both in its registration under the laws of the country and the rights which it derives from its registration, and that is of course the main consideration on which the appellants rely when they contend that their real residence is in South Africa, where the company was registered, and not in this country. On the other hand, by

1904

GOERZ & Co. v. BELL.

Channell J.

having its head office here and doing its business here through its board of directors, which meets here, this company does get a certain amount of benefit from the law and government of this country, and therefore, so far as these considerations apply, there is something to support either view.

In the main the contentions of the parties are as to the effect of the registration and incorporation in one country of a company which has its head office in another, though each side relies on other facts as being in their favour; the appellants, for instance, rely upon the holding of the general meeting at Johannesburg. Stated accurately, the question is, I think, whether the registration and incorporation of this company in South Africa prevents its being resident in the United Kingdom, for it is possible—though I do not decide the question one way or the other—that the company may have two residences. An individual undoubtedly may have more than one residence for many purposes, and I think that he may for purposes of taxation. In the majority of cases this is provided for in the incidence of taxation, and there has been at least one Scotch case in which it has been held that a man may have a residence within the United Kingdom notwithstanding that he has a residence elsewhere. That is clear in the case of a person, and I think the condition of things might be the same with regard to a company. The question resolves itself, therefore, into, firstly, whether the incorporation of this company in a foreign country prevents its having a residence in the United Kingdom, and, if not, whether the facts of the present case shew that the appellant company had a residence here.

The difficulty is created by the fact that we have to deal with an artificial entity which in the ordinary sense has no residence at all; what am I to attribute to it as being its residence? For some purposes such a body must obviously have what I may call a local habitation; communications must be made to it, and people who wish to deal with it must know where it is to be found. In one sense our law provides for that contingency, for every company, at any rate under the Companies Acts, must have a registered office, and the registered office is the place where any one who wants to find the company (to

find it officially, as it were) must go. As far as I am in a position to judge, the law of the South African Republic did not provide that there should necessarily be a registered office. During the argument there was some discussion upon the subject of what were the presumptions of English law as to foreign law upon any given subject, and it may be that, in the absence of anything whatever to guide me, I ought to presume that the law of the Transvaal had the same requirement as our own law that every company should have a registered office; that would, however, be at the best but a very artificial presumption, and I think that there is enough before me to shew that the law of the Transvaal had no such requirement, for I must presume that the articles of association, which were registered under the law of the Transvaal, were in accordance with that law, and they make no mention of any registered office, although they say something which has some resemblance to it. They deal with the head office of the company, and art. 119, which corresponds to what would be found in articles of association of an English company, provides that service of all summonses, processes, notices, and the like are to be valid and effectual if served at the head office of the company. That seems to me equivalent to saying—and the view derives support from what appears in other clauses in the articles—that if a person wants to find this company, the place at which to find it is its head office; and this again is much the same as saying that so far as the company has a local habitation it is at the head office. The head office of this company was to be subject to the determination of the directors from time to time, and the meetings of the company were to be subject to the determination of the company or of the directors; the clause as to the meetings of the company was, however, slightly different from that as to the head office, for the company's meetings were to be held in Johannesburg until otherwise determined. The clause as to the head office provides that it is to be "either in London or elsewhere on the Continent of Europe, or in Johannesburg, in the South African Republic, or at such other place elsewhere, with such branch or branches in this Republic and elsewhere, as the directors may from time to time determine." It is

1904

GOERZ & CO. v. BELL.

Channell J.

possibly immaterial that London is there placed first; but it is a fact that the directors immediately commenced to meet in London, and continued to hold their meetings there with the exception of the occasions when they accommodated their foreign colleagues by going over once a year to Paris. There is in the case a finding as to the head office which I take to be a finding of fact, and which is certainly amply supported by the evidence, that the office in London was in fact the head office; it is subject to the determination of the directors, who must be taken to have determined either that it should not be elsewhere, or that it should be in London. So far as the constitution of the company indicates what the locality of the company is to be, if the head office is its locality, it indicates that it is to be in such place as the directors determine, and they have determined upon London. No doubt it is contemplated that the company is to be one doing business in the principal countries of the world, and that by means of a head office and branches; and although the fact of its incorporation in the South African Republic would lead one to suppose that that country would be its principal place of business, it is distinctly contemplated that the principal place of business may be elsewhere, and that there may be only a branch in the South African Republic. That is the light thrown upon the matter by the company's articles, and the facts are in accordance with it. The direction of the company in the matter of the general control of its affairs was undoubtedly vested in, and exercised by, the board of directors in London, who gave powers of attorney to those who carried on the business for them in the Transvaal; and although it may not be strictly accurate to say that the business in the Transvaal was a mere branch, it was undoubtedly treated by the board rather as a branch than as the main business. Those being the facts, does the fact of incorporation in the South African Republic shew that the residence of the company was necessarily in that country, and not elsewhere?

I must now consider the case in the light thrown upon it by previous decisions. As far as I am aware, there is no case in which a company incorporated in one country has been held to

be resident in another; but there is also no case in which the company has been incorporated in one country and has not also had its head office in the same country. In *Attorney-General* v. *Alexander* (1) it is clear that the head office was in fact in Constantinople; it is equally clear that the constitution of the company provided that it should be there; both incorporation and head office were therefore in the same country, while in the present case they are in different countries, and I have to decide which of the two facts is the overriding one. The Scotch case of *Wingate & Co.* v. *Inland Revenue* (2) is possibly the nearest to the present case; but there the company, being registered in Norway, had also its registered office in that country, and did all its company business, as distinguished from its trading business, there; and although it did its main trading business in Glasgow, it did it there by means of a firm who acted as its agents; it happened that they did all the profitable business, but they did it as the company's agents, and not as its officers. No doubt in one sense all companies must act by agents; the directors and the secretary are agents of the company; but I think there is a distinction between officers of the company who directly represent the company and firms who act merely as agents for the company, and in considering within which branch of the Income Tax Act, 1853, a particular company is to fall, the question of agency may be of some importance. The first clause in the section by the expression "resident in this country" contemplates the resident carrying on his business either here or elsewhere, but carrying it on himself. The second clause deals with a person not resident in this country, but nevertheless carrying on a profession, trade, or employment here; it obviously refers mainly to cases where the person residing abroad carries on some kind of business in this country by agents, and s. 41 of the Income Tax Act, 1842, provides for the agent being accountable in cases coming within the second clause of Sched. D. In *Wingate & Co.* v. *Inland Revenue* (2) the Court held that the Glasgow agents were accountable, and accountable for the whole profits of the Norwegian company, because

(1) L. R. 10 Ex. 20.

(2) 24 R. 939.

1904

GOERZ & Co. v. BELL.

Channell J.

the whole of those profits were made in Glasgow; it was the agent that was in Glasgow, not the company.

What is the position in the present case? In this country we find the head office and the directing power, persons who are in one sense agents of the company—its directors, managing director, and so on—but who are not merely its agents but also its officers. So far as the company has a corporeal existence other than that of the corporation by name after its incorporation, they are the company. It seems to me that we are dealing here with the company, and not merely with agents of the company. I think, therefore, that the true inference is that this company must be held to be resident in this country within the meaning of the first clause of Sched. D. If it were necessary to decide between Johannesburg and London, I think that the considerations which go to make up the local habitation of such a body rather shew that this company is to be found in London and not in Johannesburg. There are agents in Johannesburg, but the company is to be found here, whereas in *Wingate & Co.* v. *Inland Revenue* (1) the company was to be found in Norway and its agents in Glasgow. I feel bound to come to this conclusion. The cases are of very little assistance, because the considerations which in the present case are partly in favour of one side and partly of the other are in the reported decisions all upon the one side or the other.

Although the company, by getting itself registered in the South African Republic, undoubtedly desired, so far as that term is applicable to a company before incorporation, to take advantage of the law of that country, yet, having regard to the constitution of the company as appearing from its articles, I can see nothing to prevent it after incorporation from residing elsewhere, either instead of, or as well as, in the South African Republic, and I think that the company did reside elsewhere. Of course it, or its promoters, intended to get the benefit of the law of the Transvaal and did get it, and no doubt the intention was that it should be a "Boer" and not an "Uitlander" company, and it got very substantial advantages in

(1) 24 R. 939.

its operations by reason of its being incorporated there instead of in England; it was so incorporated on purpose. These facts shew, in my opinion, that it was from the first intended that the operations of the company might be mainly outside the Transvaal, and in fact they were mainly outside that country. Upon the dicta to be found in past decisions I think this company must be taken to be resident in the United Kingdom.

Under these circumstances it is unnecessary to say anything upon the second point that was taken before me beyond this, that in approaching it my view upon the main point that I have already expressed is confirmed. If this company were to be dealt with under the second clause of Sched. D. as a non-resident company, one would look to find who was to be made answerable in respect of such part of the business as was done in this country, and for this purpose one would look for the agents of the non-resident company, and on looking for them one would not find the agents but would find the company itself. That goes to confirm the view that this case falls within the first clause, and not within the second clause, of Sched. D. My judgment must, therefore, be for the Crown.

Appeal dismissed.

Solicitors for appellants: *Herbert Smith, Goss, King & Gregory.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

W. J. B.

1904
Feb. 22, 23.

In re An Arbitration between WALKERS, WINSER & HAMM and SHAW, SON & CO.

Sale of Goods—Contract—Sale by Sample—Variation in Quality between Bulk and Sample—Validity of Custom for Buyer not to Reject—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *ss.* 15, 55.

A contract in writing for the sale of barley at an agreed price per bushel provided that the barley at the time of shipment under the contract was to be "about as per sample," and contained an arbitration clause. The buyers having rejected the barley for inferiority to the sample, the sellers relied before the arbitrator upon a custom of the London Corn Exchange, applicable to such contracts, by which the buyer was not entitled to reject for difference or variation in quality, unless the same was excessive or unreasonable, and was so found by arbitration under the contract. The arbitrator found that the barley was not "about as per sample," so as to entitle the sellers to insist upon payment of the full contract price without any allowance; but that the inferiority was not excessive or unreasonable, nor so great as to amount to a difference of description, and he awarded that the buyers were not entitled to reject the barley, but must accept it with an allowance in price in respect of the inferiority:—

Held, that the custom was good in law, not being unreasonable or uncertain or in contradiction of the written contract, and that the award must therefore be upheld.

Award stated in the form of a special case pursuant to s. 7 (*b*) of the Arbitration Act, 1889. The following were the material facts:—

Messrs. Walkers, Winser & Hamm, the sellers, were grain merchants in London, and Messrs. Shaw, Son & Co., the buyers, were grain merchants in Hull, having frequent transactions in grain on the London market. By a contract in writing, dated October 1, 1902, the sellers agreed to sell and the buyers to purchase about 500 tons of St. Malo barley, at time of shipment to be about as per sample No. 373, for shipment in October, 1902, at 23*s.* 6*d.* per 420 lbs. free on board, including freight and insurance to Hull, Grimsby, or Goole; it was further provided (inter alia) that any shipment in partial execution of the contract was to be deemed and accepted as if made under a separate contract, and that any dispute arising

out of the contract should be left to arbitration in London in the usual way. The sellers chartered the steamship *Formby* for the purpose of the contract, and caused to be shipped per that steamship from St. Malo, in pursuance and in partial execution of the contract, about 415 tons of barley, and duly appropriated the shipment to the contract, and on October 7 the buyers gave directions, which were duly communicated to the master, that Hull was to be the destination of the vessel. On the afternoon of October 8, after the *Formby* was partly loaded, the buyers (having previously requested and received from St. Malo a bulk sample of the barley shipped) by telegram sent from Hull requested the sellers to stop the shipment, alleging that the bulk sample differed from the selling sample; the sellers replied that they were unable to stop the shipment. The loading of the *Formby* was completed on October 9, and she forthwith sailed for Hull, where she arrived on October 13. The buyers, who had already refused to take up and pay for the invoice and shipping documents, persisted in their refusal when the *Formby* arrived, whereupon the sellers landed the barley for account of whom it might concern pending arbitration, and on the same day nominated their arbitrator; the buyers then nominated an arbitrator, and an umpire was appointed. In the result the arbitrators were unable to agree, and the award was made by the umpire.

The umpire heard evidence as to (inter alia) the existence of a custom in the London corn trade relied upon by the sellers, as to which he found in the following terms: "By the custom and usage of the London corn trade applicable to the sale of barley or other grain on contracts in the form employed in this case a buyer is not entitled to reject for difference or variation in quality unless the same is excessive or unreasonable, and is so found by arbitration under the contract. This has been the custom in the corn trade in London for a very long period, and it has been adopted as one of the terms of the forms of contracts for sale of barley and other grain issued by the London Corn Trade Association since its incorporation in 1886, which forms are very largely used, not only in the United Kingdom, but also throughout the British Colonies and

1904

WALKERS, WINSER & HAMM AND SHAW, SON & CO., *In re.*

possessions and on the Continent of Europe, and in America and elsewhere. The words inserted in the forms of contract are, 'difference in quality shall not entitle the buyers to reject except under the award of arbitrators or the committee of appeal as the case may be'; and a similar rule has been adopted by the Corn Trade Associations of Liverpool and Hull as a rule in forms of contracts issued by these associations."

The finding of the umpire as to the barley in question in this case was in the following terms: "The barley shipped per *Formby*, although somewhat inferior to the sale sample in quality, and in this respect not 'about as per sample' so as to entitle the sellers to insist on payment of the full contract price without any allowance, was commercially within the contract, and the inferiority was not excessive or unreasonable, nor was it so great as to amount to a difference of description." The umpire awarded and directed, subject to the opinion of the Court on the question stated in the case, that the buyers were not entitled to reject the barley, and that they should accept it with an allowance of 1*s*. 9*d*. per 420 lbs.

The question of law stated for the opinion of the Court was whether the custom or usage was bad in law, and, if so, whether by reason of the inferiority of quality the buyers were justified in entirely rejecting the barley per *Formby*, and in refusing to accept it subject to an allowance.

Scrutton, K.C., and *Loehnis*, for the buyers. The alleged custom is bad in law. First, it contradicts the written contract between the parties. By s. 15 of the Sale of Goods Act, 1893, there is in a contract for sale by sample an implied condition that the bulk shall correspond with the sample in quality; in the present case the written contract itself deals with the allowable margin of variation by providing that the bulk is to be "about" as per sample, and that margin is allowed for in the price agreed upon. The arbitrator having found that the bulk was not "about as per sample," the reading in of the custom forces the buyers to take a different description or quality of barley at a different price, and the custom is therefore repugnant to the written contract,

which contains no clause preventing rejection for difference in quality.

[They cited on this point *Yates* v. *Pym* (1); *The Alhambra* (2); *Barrow* v. *Dyster* (3); *Vigers* v. *Sanderson.* (4)]

Secondly, the custom is unreasonable, for it improperly limits the buyers' right of rejection under the contract.

[They cited *Leuckhart* v. *Cooper.* (5)]

Thirdly, the custom is uncertain. It necessarily involves speculation as to what an arbitrator, not agreed upon at the time of the contract between the parties, may think as to the price which the buyers ought to pay, which depends upon his individual view as to what constitutes an unreasonable difference or variation in quality; there is no business certainty about such a custom. Fourthly, there was no evidence of the custom to justify the finding of the arbitrator. In such a case "some" evidence of the custom is insufficient; the custom must be notorious and clearly proved. In any event, the custom, if it ever existed, had ceased to exist as a custom by reason of its insertion as a special clause in the contracts of sale of the London Corn Trade Association; the omission of a clause usually inserted in these contracts cannot be explained by evidence of a custom to contract with reference to it.

Carver, K.C., and *Leck*, for the sellers. The custom is good, and there was ample evidence of it for the arbitrator. The evidence was that difference in quality does not entitle the buyer to reject except in extreme cases, and that this had been the usage of the trade for forty years. In the present case correspondence of the bulk with the sample is not a condition of the contract. It is true that by s. 15 of the Sales of Goods Act, 1893, such a correspondence is an implied condition of a sale of goods by sample; but s. 55 of that Act operates to exclude that implied condition, for it provides that "where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived

(1) (1816) 6 Taunt. 446; 16 R. R. 653.
(2) (1881) 6 P. D. 68.
(3) (1884) 13 Q. B. D. 635.
(4) [1901] 1 K. B. 608.
(5) (1836) 3 Bing. N. C. 99; 43 R. R. 602.

1904

WALKERS, WINSER & HAMM AND SHAW, SON & CO., *In re.*

or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract"; such a usage having been shewn to exist in fact, this is a case where the operation of s. 15 is controlled by s. 55. The custom is not inconsistent with the contract; it explains it. The introduction of a price is merely to set a standard of value; it is the value of a bushel of barley corresponding to the sample, and there will be a variation in price for a variation in quality. The provision that the bulk shall be "about as per sample" is not a condition of the contract but a warranty, for the breach of which damages would, but for the arbitration clause, be recoverable by action. Nor is the custom unreasonable; it is on the contrary, as is evident from its having existed for forty years, almost necessary for the conduct of business. There is no analogy between the present custom and those set up in *Leuckhart* v. *Cooper* (1) and *Sea Steamship Co.* v. *Price, Walker & Co.* (2), which were held unreasonable. Nor is the custom uncertain in itself; it is, on the contrary, certain in itself, and the only uncertainty is in its application to particular cases by the tribunals which have to apply it.

[They also cited *MacAndrew* v. *Chapple* (3); *Jackson* v. *Union Marine Insurance Co.* (4)]

CHANNELL J. This case raises some difficult questions. In the main they are points of difficulty which always arise where one tribunal has to review the decision of another tribunal, and has not the same jurisdiction to go into the whole matter in the way it has been gone into by the tribunal below. The same difficulty arises in county court appeals and in cases stated by magistrates as in special cases stated by arbitrators, and it lies in the fact that the tribunal which reviews these decisions has only power to review them in so far as they deal with questions of law; questions of fact are still for the arbitrator alone, notwithstanding the alterations introduced by the Arbitration Act.

(1) 3 Bing. N. C. 99; 43 R. R. 602.
(2) (1903) 8 Com. Cas. 292.
(3) (1866) L. R. 1 C. P. 643.
(4) (1874) L. R. 10 C. P. 125.

In the present case a slight additional difficulty is introduced by reason of the terms in which the custom has been found by the umpire. The custom set up is one applicable to the sale of barley or other grain on contracts in the form employed in this case, and that form is a contract to purchase barley to be shipped in France at a price including cost, freight, and insurance, with a clause providing that all disputes shall be settled by arbitration, but without any clause such as is stated to be put into forms of contract settled by the London Corn Trade Association to the effect that difference in quality shall not entitle the buyers to reject except under the award of arbitrators or the committee of appeal, as the case may be. The arbitrator finds that "by the custom and usage of the London corn trade applicable to contracts in the form employed in this case a buyer is not entitled to reject for difference or variation in quality, unless the same is excessive or unreasonable and is so found by arbitration under the contract." Now this finding states generally that the buyer is not entitled to reject for difference or variation in quality, and if it had stopped there I should certainly consider such a custom unreasonable. But then comes the qualification, "unless the same is excessive or unreasonable," and upon the whole I have come to the conclusion that this qualification saves the custom from being unreasonable and makes it a good custom. I think that the meaning of the custom as stated by the arbitrator is that the buyer has not a right to reject merely for difference or variation in quality, provided that that difference or variation is a matter that can reasonably be met by an allowance in the price, that is, that it does not affect anything beyond the price of the goods; but that, if the goods tendered are not fit for the purpose for which they were bought, such a variation would be unreasonable, so that it would not be fair to require the buyer simply to take the goods at an allowance in price. If that is the true meaning of the custom as found, I see no reason to prevent effect being given to it in law.

The law relating to contracts of sale such as the present one is stereotyped in the Sale of Goods Act, 1893, especially in ss. 15 and 55. Under s. 15, sub-s. 2, upon a contract for sale

1904

WALKERS, WINSER & HAMM AND SHAW, SON & CO., *In re.*

Channell J.

of goods by sample there is an implied condition that the bulk shall correspond in reality with the sample; there is not merely a warranty, but a condition, and therefore the buyer may reject the goods tendered if they are not in accordance with the sample. But by s. 55, where any right, duty, or liability would arise under a contract of sale by implication of law (which, I think, clearly includes the present case), it may be negatived by (inter alia) usage, if the usage be such as to bind both parties to the contract. Consequently there may be a usage which would prevent this implied condition arising, and in other words would turn it from a condition into a mere warranty, upon which, if there were no arbitration clause, damages would be recoverable, while if there were an arbitration clause the matter would be settled by the arbitrator making an allowance on the sale price. Where, therefore, there is a valid and effective usage in law, this implied condition, as a condition, is gone.

The first point made against the custom is that it contradicts the written contract, and if that were the case of course no effect could be given to it. But I think that that objection is answered by the fact that this particular custom, which it is sought to import into this contract, is imported or introduced into a large number of contracts in this trade, and that, when it forms part of the contract, it is not contended that it makes the contract insensible so that effect cannot be given to it. I do not think, therefore, that the custom is so inconsistent with the contract in this case that the contract cannot be acted upon. If the custom went the length of saying that there should be no remedy for any variation in the quality contracted for, it would of course be unreasonable, for it would absolutely alter the nature of the contract; but it being simply a custom that the buyer takes the goods with a variation in the price, and with the limitation imposed by the words "unless the same is excessive or unreasonable," I cannot see that it is inconsistent with the written contract.

The next objection to the custom, that it is unreasonable, is very nearly the same as the objection with which I have already dealt. It is suggested that a contract which does not embody

such a custom is not really a fair contract between the parties, because the buyer has the option to reject the goods when it is to his interest to do so owing to a fall in the market price, and also the option to keep the goods, notwithstanding the variation in quality, when the price has risen. It is contended, and I think with considerable force, that it is a reasonable thing to have a custom which will prevent the buyer setting up a right to reject merely on the ground of a variation in quality which will not affect the purpose for which he intends to use the goods, but only affects the price which he has to pay for them. A custom so limited cannot be unreasonable.

Then it is said that the custom is uncertain because it depends upon the idiosyncrasies of the arbitrator. But reasonableness is a question which has often to be considered in law, as in the determination of reasonable price, reasonable time, reasonable care and skill; and there is no standard of reasonableness except that which a jury, which is the ordinary tribunal dealing with such matters, may think to be reasonable, and juries are no more free from idiosyncrasies than are arbitrators; there must be variations of opinion as to the reasonableness of a custom. I think, therefore, that the fact that this custom depends in its operation upon what the tribunal which has to deal with it thinks to be reasonable does not make it in law uncertain so as to prevent any effect being given to it.

The only other question is whether I can interfere with the arbitrator's finding that the custom exists in fact, and this depends upon whether there was any evidence of the custom; if there was none, I am at liberty to treat it as a question of law, while if there was evidence, the question becomes one of fact with which I have no power to deal. If the whole matter were for me, I think I should come to the conclusion that there was no such custom, and for the following reason. There is a considerable amount of evidence given by gentlemen who have been conversant with this trade for many years to the effect that at one time the custom did exist, in the sense that it was not incorporated in written contracts but was taken to be understood between the parties, who made their contracts upon the footing of its existence without actually incorporating it.

1904

WALKERS, WINSER & HAMBI AND SHAW, SON & CO., *In re.*

Channell J.

After a time, however, the London Corn Trade Association was formed, and that association had, and still has, its own form of contract in which there is an express clause more or less corresponding with this alleged custom. From this I should myself have drawn the inference that the members of the association, as men of business, thought it more convenient that such a matter should be expressed in the contract itself rather than that it should be left to the understanding of the parties, and that they therefore put it into the common form of contract in order that the parties to any particular contract might agree to it, if they meant to do so, or might leave it out if they did not wish for it. If the parties put a provision to this effect into their contract, it destroys the custom as a custom, for a custom is something so well understood that it is unnecessary to expressly insert it in a contract. There is also the fact which has been pointed out that there was considerable difference among the witnesses as to certain details of the custom. On the whole, however, I do not feel at liberty to say that there was no evidence upon which a reasonable person could come to a conclusion in favour of the existence of the custom. There were several witnesses who gave emphatic evidence in favour of it, although their evidence varied somewhat in details. Then there is the further fact that the arbitrator was himself the chairman of the London Corn Trade Association, having a peculiar knowledge of the subject, upon which he was entitled, to some extent at any rate, to act; he has not, however, acted solely on his own knowledge, for he has had the evidence of gentlemen possibly as skilled as himself in the particular trade. I think, therefore, that there was some evidence of custom before the arbitrator, and although I should probably have myself found the other way, I cannot interfere with the arbitrator's findings, and my judgment must be in favour of the sellers.

Judgment accordingly.

Solicitors for the sellers: *Pritchard & Sons.*
Solicitors for the buyers: *Lowless & Co.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1904
May 6.

In re O. C. S. (A DEBTOR). *Ex parte* THE DEBTOR.

Bankruptcy — Bankruptcy Notice — Irregularity — Notice founded on Two Judgment Debts—Amendment—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*); *s.* 143.

A receiving order was made against a debtor, the act of bankruptcy being non-compliance with a bankruptcy notice. On appeal from the order it was objected that the bankruptcy notice was bad, because it was founded on two judgment debts (as was decided by the Court of Appeal in *In re Low*, [1900] 1 Q. B. 147), and that consequently there was no act of bankruptcy. This objection had not been taken in the Court below:—

Held, that the objection was fatal to the receiving order, and, in accordance with *In re Collier*, (1891) 8 Morr. 80, 83, that leave to amend the bankruptcy notice ought not to be given.

But, because the objection was not taken in the Court below, the appellant, though he was allowed his costs of the appeal, was not allowed those of the hearing below.

APPEAL by the debtor from a receiving order made against him by one of the registrars.

In the bankruptcy petition the petitioning creditors alleged that the debtor was indebted to them in the sum of 659*l.* 1*s.*, being the amount of two final judgments obtained by them against him in the King's Bench Division, both on March 30, 1904, the one for 250*l.* 0*s.* 8*d.*, with 17*s.* 9*d.* interest thereon, and the other for 406*l.* 13*s.* 8*d.*, with 1*l.* 8*s.* 11*d.* interest thereon. The act of bankruptcy alleged was non-compliance with a bankruptcy notice served by the creditors on the debtor on March 30. The petition was presented on April 12.

The bankruptcy notice required the debtor within seven days after service to pay to the creditors the sum of 659*l.* 1*s.*— "claimed by them as being the amount due on two final judgments obtained by them against you in the King's Bench Division dated March 30, 1904."

The debtor gave notice of his intention to oppose the making

C. A. 1904

O. C. S. (A DEBTOR), *In re.* THE DEBTOR, *Ex parte.*

of a receiving order, and that he intended to dispute (inter alia) the petitioning creditors' debt and the act of bankruptcy.

The registrar made a receiving order.

The debtor appealed.

Herbert Reed, K.C., and *Carrington*, for the debtor. A fatal objection to the receiving order is that the bankruptcy notice is bad, because it includes two judgment debts: *In re Low.* (1) Consequently no act of bankruptcy was committed. This objection was not taken before the registrar, but it is submitted that it is open to the debtor to take it now.

Montague Lush, K.C., and *Henry Kisch*, for the creditors. The debtor, not having taken this objection before the registrar, ought not to be allowed to take it now.

But at any rate this is a mere formal defect or irregularity, and no substantial injustice has been caused by it, and therefore by s. 143 of the Bankruptcy Act, 1883, the proceeding is not invalidated, and the Court has power to allow the bankruptcy notice to be amended. That power is, indeed, not limited to merely formal defects.

[VAUGHAN WILLIAMS L.J. In *In re Collier* (2) a rule was laid down by the Divisional Court, and I think that rule has ever since been acted on. In that case Cave J. said (3): "Due service of a bankruptcy notice is necessary in order to constitute an act of bankruptcy, and it is more important that the rules and regulations should be properly complied with than in the case of a petition for adjudication. When the act of bankruptcy has been committed then the petition is a less formal matter and one as to which it is not necessary to take exactly the same view. Very soon after the Act of 1883 came into operation several cases were brought before the Court with reference to a bankruptcy notice, and on more than one occasion the Court of Appeal expressed the opinion that, since the commission of an act of bankruptcy was a serious matter and involved consequences of what has been called a penal nature it was important to see that the necessary preliminaries were complied with." In that decision I concurred. I have

(1) [1891] 1 Q. B. 147. (2) 8 Morr. 80. (3) 8 Morr. at p. 83.

ever since declined to allow an amendment of a bankruptcy notice, except in the case of a merely formal defect.]

There may be special cases in which the general rule should not be applied. It must depend on the circumstances of each case. Suppose an objection was not taken by a debtor until he was before the House of Lords, it is submitted that he would not then be allowed to take an objection which he had not taken in the Courts below.

In *In re Wenham* (1) the Court of Appeal were of opinion that a bankruptcy notice could be amended even when the defect was not merely formal, no substantial injustice having been caused.

[*Herbert Reed, K.C.*, referred to *In re Bassett.* (2)]

Vaughan Williams L.J. It is not disputed that the bankruptcy notice was defective by reason of its being based upon two judgment debts, and I think, having regard to the decision in *In re Collier* (3), we ought not to allow the notice to be amended. Speaking from my own experience as the bankruptcy judge, I know that the rule laid down in *In re Collier* (4) has been constantly acted upon for many years, and I think we ought not now to depart from it. It is said that no injustice will be done by allowing an amendment. I do not feel sure of that. But, whether that be so or not, I think we ought to be very careful about allowing an amendment of a bankruptcy notice, which is to some extent a penal proceeding.

Stirling and Cozens-Hardy L.JJ. concurred.

Vaughan Williams L.J. The appellant will have the costs of the appeal. In the Court below he was not in default until the hearing, when this objection should have been taken. He will have his costs up to the hearing, but not the costs of the hearing.

Appeal allowed.

Solicitors: *Raphael & Co.; Beyfus & Beyfus.*

(1) [1900] 2 Q. B. 698, 706, 709.
(2) (1895) 2 Man. 177.
(3) 8 Morr. 80, 83.
(4) 8 Morr. 80.

W. L. C.

1903
July 15.

COOPER, Appellant *v.* HAWKINS, Respondent. (1)

Highways—Locomotives—Crown Prerogative—Exemption—Locomotive driven on Service of Crown—Locomotives Act, 1865 (28 & 29 *Vict. c.* 83).

By the Locomotives Act, 1865, power is given to local authorities to make regulations as to the speed (not in any case to exceed two miles an hour) at which locomotives may pass through the place subject to their jurisdiction; and by s. 4 it is provided that, subject to those regulations, it shall not be lawful to drive any such locomotive along any turnpike road or public highway at a greater speed than four miles an hour, or through any city, town, or village at a greater speed than two miles an hour:—

Held, that, in the absence of any express mention of the Crown in the Act, the section did not apply to a locomotive owned by the Crown and driven by a servant of the Crown on Crown service.

Case stated by justices.

The appellant appeared before the justices on March 12, 1903, on an information laid by the respondent charging that he on February 26, 1903, at Aldershot, did unlawfully drive a certain locomotive propelled by steam along a certain public highway there situated at a greater speed than two miles an hour, to wit, at a speed of above three miles an hour, contrary to s. 4 of the Locomotives Act, 1865.

The following facts were proved or admitted:—

The appellant was a civilian, and had for six and a half years then last past been and then was employed and paid by His Majesty's Principal Secretary of State for the War Department on behalf of His Majesty as leading engine-driver.

The respondent was a superintendent of police in the Hants constabulary stationed at Aldershot.

On February 26, 1903, at about 5.30 P.M., the appellant was driving a locomotive with one truck attached along Wellington Avenue in the town of Aldershot at a speed of over three miles an hour.

The locomotive was the property of His Majesty, and the

(1) Now reported by special request. See now, as to light locomotives, the Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 16.

appellant was driving the locomotive in the course of his duty as such servant as aforesaid, and in accordance with the instructions of his superior officer, the coal in the truck being required for use that night in the balloon factory.

It was contended on behalf of the appellant that s. 4 of the Locomotives Act, 1865, did not apply to the appellant as being a servant of His Majesty, or to the locomotive as being the property of His Majesty and being driven in manner aforesaid in the service of His Majesty.

The justices were of opinion that the section applied to the appellant and to the locomotive, and convicted the appellant, but stated this case for the opinion of the Court. (1)

The Solicitor-General (*Sir E. Carson*) (*H. Sutton* with him), for the appellant. The statute does not bind the Crown unless it expressly or by direct implication purports to do so. The statute gives local authorities power to make by-laws, and it would be unreasonable to subject the Crown to them. In *Willion* v. *Berkley* (2) it is laid down that it is usual for the Legislature in Acts of Restraint which they intend to bind the King to name him expressly, and if he is not expressly named it has always been taken heretofore that the Legislature intended only to bind the subjects, and to make the Act extend to them and not to the King, for he is favoured in all expositions of Acts. In this statute there is nothing which either expressly or impliedly binds the Crown, and there is no case here either of a public nuisance or of imperilling the safety of the public. The case is really governed by the decision of Day and Wills JJ. in 1887 in *Gorton Local Board of Health* v. *Prison Commissioners* (3), where the Court decided that the

(1) By the Locomotives Act, 1865 (28 & 29 Vict. c. 83), s. 4, "It shall not be lawful to drive any such locomotive along any turnpike road or public highway at a greater speed than four miles an hour, or through any city, town, or village at a greater speed than two miles an hour."

(2) (1561) Plowd. 223.

(3) DAY and WILLS JJ. June 17, 1887.

GORTON LOCAL BOARD *v.* PRISON COMMISSIONERS.

CASE stated by magistrates.

The corporation of Manchester as a prison authority had, before 1877, bought a plot of land under the

1903

COOPER v. HAWKINS.

Public Health Act, 1875, and the by-laws made under that Act, had no application to land acquired by the Crown for the Prison Act, 1865, and erected upon it a prison which did not cover the whole area.

Under the provisions of s. 5 of the Prison Act, 1877 (40 & 41 Vict. c. 21), the prison was vested in one of H.M. Principal Secretaries of State, but by virtue of s. 48 the legal estate therein was to be deemed to be vested in the Prison Commissioners to be disposed of by them in such mode as the Secretary of State with the consent of the Treasury might direct. The plot of land was within the district of the Gorton Local Board, which was duly incorporated under the Public Health Acts.

One of the by-laws made by the local board provided: "No new houses shall be occupied until the house drainage has been made and completed, nor until such house has been certified by the local board or their officer authorized to give such certificate after examination to be in every respect fit for human habitation in his or their opinion."

A penalty was imposed on persons offending against the by-laws.

In 1886 the Prison Commissioners decided to erect two blocks of houses with other buildings and appurtenances on part of the plot of land in question. These houses were to be used for officers' quarters for the use of the prison. No plans of these buildings were submitted to the local board before their erection, and after their erection the local board applied to the governor of the prison to allow them to be inspected for the purpose of ascertaining whether they were fit for habitation pursuant to by-law 26. This was refused, and the prison authorities denied the right of the local board to require their compliance with the by-laws.

The local board, therefore, took proceedings to enforce their by-laws; but the magistrates held that the Prison Commissioners were officers under the direct control and acting by the authority of the Secretary of State, who represented the Crown, and that the plot of land was vested or deemed to be vested in the Commissioners for the purposes of the Crown, and, as the Crown was not named in the Public Health Acts, the by-laws of the local board did not apply to the plot of ground. They accordingly dismissed the summons, but stated a case for the opinion of the Court.

The questions were whether there was evidence that the part of the plot in question and the buildings thereon formed part of the prison as defined by the Prison Act, 1865, s. 4, and the Prison Act, 1877, s. 60, and whether the land and buildings being vested in the Prison Commissioners for the use of the Secretary of State for public prison purposes, the by-laws were applicable thereto, and whether, under the circumstances, penalties for breach of the by-laws could be enforced against the Prison Commissioners.

Charles, *Q.C.*, and *Heywood*, for the appellant.

The Attorney-General (*Sir R. E. Webster*, *Q.C.*), and *R. S. Wright*, for the respondents.

DAY J. This is an appeal from a decision of the magistrates at Manchester, who held, upon a summons taken out by the Gorton Local Board against the Prison Commissioners,

purpose of building a prison. [He also cited or referred to *Attorney-General* v. *Donaldson* (1); *Hornsey Urban Council* v. *Hennell* (2); *Rex* v. *Cook*. (3)]

that the Prison Commissioners were not liable to penalties by reason of their having erected certain buildings for the purposes of habitation without a certificate from the proper officer of the local authority at Gorton. [His Lordship then discussed at length the question whether on the facts the buildings formed part of the prison, and came to the conclusion that they were not part of the prison and were not exempt from the by-laws on that ground. He then continued:—]

But upon the other point I entertain a different opinion; at least, I entertain the same opinion that was entertained by the magistrates in reference to what was argued before them. I am not quite sure whether this point was raised before the magistrates or not. It is raised upon this special case, and with it we have to deal. I am clear that, having regard to this point, the decision of the magistrates must be upheld. It is clear to my mind that this plot of ground is State property, and it is property therefore, in my judgment, over which the local authority can have no control whatever. It is property provided by the Crown, if I may use that expression, for the purposes of the Crown, and it is occupied by servants of the Crown, and, in my judgment, that property is to be entirely under the control of the Crown, and is not to be controlled by the local authority. There is certainly no express mention of the Crown so as to bind the Crown in the Public Health Act, 1875, and there is certainly no necessary implication that the Crown itself is to be bound. In the absence of express words the Crown is not to be bound, nor is the Crown to be affected except by necessary implication. There are many cases in which such implication does necessarily arise, because otherwise the legislation would be unmeaning. That is what I understand by "necessary implication." Here the Crown is not mentioned, and no necessary implication of any sort or kind arises, and it is clear that the Crown by its officials is quite competent to provide for the sanitary condition of these houses. It is quite competent to do all that it thinks fit to be done in the matter, and it is not to be controlled—that is, to my mind, a matter of the greatest public interest—the State is not to be controlled in the disposition of the property entrusted to the State for State management by any local authority whatever. I am clearly of opinion that on this ground the decision of the magistrate must be upheld and the appeal dismissed.

WILLS J. I am of the same opinion. [His Lordship then gave his reasons for holding that the buildings in question did not form part of the prison, and continued:—]

A far more serious and important question is whether the by-laws were intended to apply at all to property held for public purposes in the fashion and in the circumstances under which this property is held, whether by th

(1) (1842) 10 M. & W. 117; 62 R. R. 540. (2) [1902] 2 K. B. 73.
(3) (1790) 3 T. R. 519.

1903

COOPER v. HAWKINS.

C. A. Russell, K.C. (*Ricketts* with him), for the respondent. If an Act is made for the public good and for the prevention of

Secretary of State or by the Prison Commissioners. It is clear that this is property of the Crown in the sense in which that expression has always been used when questions of this kind arise as to the rateability of property, or as to other incidents and burdens upon property in respect to which the Crown may claim exemption because it is the Crown; and it seems to me clear that it is property which is held by either the Secretary of State or the Prison Commissioners as State property, and in that sense it is Crown property. It is property held and administered by the Crown for the service of the public.

In my judgment, however anxious one may naturally be to confine the application of the prerogative within its legitimate limits, it seems to me that it is clear, from authority and from principles which are established beyond cavil and dispute, that the Crown is not bound unless it is expressly or by necessary implication named. How can it be said here that there is a necessary implication of the Crown? It is not necessary, as it seems to me, for the purposes of the public health and public good, which are intended to be served by the Public Health Act, that this jurisdiction should be vested in the local board. In the year 1865 substantially the same legislation with regard to the possibility of the enactment of by-laws by local boards was in existence, and in that year was passed the Prison Act, 1865, which enacts amongst other things, by s. 26, that the Secretary of State "may approve of the plans submitted to him with or without modification, or may disapprove of the same," and there is no doubt that the subject-matter to which these plans may relate is large enough to cover such a building as this. There is, therefore, a high and responsible officer of State in whom is vested the discretion of approving or disapproving of such plans, and in whom was vested that discretion at a time when these by-laws and a great many other by-laws of a similar character must have been in force under the Local Government Act of 1858. Can anybody suppose that it was intended that the approval of the Secretary of State should not be effectual, and that because the locus in quo was situated within the area of the jurisdiction of a local board, although the Secretary of State approved the plans, the plans which he approved of should not be followed out? It seems to me something like an absurdity to suppose such a thing, and there is certainly as much reason in legislation giving credit to the Secretary of State that he would do his duty and would see that the great interests of the health of the public were regarded as in supposing that the local board in each district would do its duty. The protection of the public is as complete and as effectual as under the approval or disapproval of the local board.

Well, that was the state of things down to 1875. In 1875 the present Public Health Act was passed, and that repealed all the prior legislation. It may be true that legislation took, in a certain sense, a fresh departure in point of form from that period; but can anybody who is familiar with the course of legislation and the history of these Public Health Acts suppose that, simply because the Act of 1875

injury to the public, the Crown is bound by it, although it may not be specially named: Com. Dig. tit. "Parliament," H. (1.); Bac. Abr. tit. "Prerogative," E. (5.). The particular regulation contained in this section is for the benefit of and tends to the safety of the public, and therefore it binds the King without special mention. The cases cited are entirely different in their

is subsequent to the Prison Act, 1865, it was intended that there should be any change wrought in the effect of legislation in this respect? It seems to me that the Public Health Act, 1875, leaves untouched this prior legislation applicable to prisons in general, and although this place was not popularly a prison, yet it certainly was under the Prison Act, 1865, a prison subject to the provisions of that Act, and it seems to me that it is impossible to suppose that it was intended to take away from the Secretary of State that jurisdiction which he had before, finally and authoritatively and effectually to approve, if he chose, of the plans which were to be submitted to him.

It is suggested by Mr. Charles, and one was naturally struck with the argument at first, that we find a particular saving clause with regard to some portion of the rights of the Crown in s. 327 of the Public Health Act, and therefore that it may be presumed that all other exceptions of the Crown were intended to be done away with and to be given up. When one comes to look at the nature of the Public Health Act, 1875, generally, and especially when one has regard to the consideration with which I have already dealt in regard to specific matters, and the fact of an approval being already vested in the Secretary of State under exactly similar legislation, I think that it is impossible to suppose that the saving clause, although limited as it is, was meant to give up everything else. It is always a question of circumstances, and it is very often a question not quite free from difficulty, whether a particular clause is put either in an Act of Parliament or in any other instrument ex majori cautelâ, or whether it is put in for the purpose of limiting the application of its provisions which otherwise might be supposed to extend beyond its own limits. It is seldom easy to say without a good deal of consideration which kind of interpretation ought to be put upon it. It seems to me, I confess, that, looking at the very great alteration which would be made in the status of the Crown property all over the kingdom if we were to hold that this exception of the rights of the Crown in s. 327 was intended to give up everything else, it is impossible for us to say that that really was the intention of the clause, and I think that that clause was put in simply ex abundanti cautelâ.

For these reasons it becomes unnecessary to express any opinion as to whether the Prison Commissioners or the Secretary of State would be formally the proper persons to bring before the magistrates, because I am of opinion that these proceedings cannot in any shape succeed against the Crown or against the Prison Commissioners, or against anybody concerned in this matter.

Judgment for respondents.

1903

COOPER v. HAWKINS.

circumstances to the present. [He referred to *Reg.* v. *Justices of Kent.* (1)]

LORD ALVERSTONE C.J. Upon the general question of when statutes should or should not be held to bind the Crown, I cannot add anything to that which I said in the *Hornsey Case* (2), which was a judgment which was concurred in by my brothers Darling and Channell, and in which I tried as far as I could to consider the authorities bearing upon the matter. I do not see any reason to express myself differently to the way in which I expressed myself in that judgment.

If it should be thought necessary to report this case, I think it is very important that the judgments of Day J. and my brother Wills in *Gorton Local Board of Health* v. *Prison Commissioners* (3) should be reported, because, if I may be allowed to say so, they are of very great value upon this question. They proceed upon rather different considerations from those which we had before us in the *Hornsey Case* (2), and they are a very valuable contribution to the law on this matter, if it be not considered to be sufficiently plain. Therefore, upon the general question as to the statutes which do or do not bind the Crown, I do not wish to add anything. I do not overlook that to which I ventured to refer in the *Hornsey Case* (2), that there may be general provisions of a public character which may bind the Crown; and the point of difficulty in this case is that s. 4 of this Act is a section which must be held to be enacted for the public safety, and, therefore, it is contended that the object of the Act being to protect the public, it ought to be held to bind the Crown. I cannot myself regard such a section as this as coming within that category; and, if I compare it with the provision which was the subject of consideration in the *Gorton Case* (3), all I can say is, that this seems to be far less of that character than the one then under consideration. The section with which the Court had to deal in that case provided that the building should not be used unless properly inspected by a sanitary authority. To

(1) (1889) 24 Q. B. D. 181. (2) [1902] 2 K. B. 73.
(3) Ante, p. 165, n. (3).

my mind it is quite obvious, when you are dealing with an Act which gives power to a local authority to make by-laws and regulations, and which limits the speed of these locomotives to two miles an hour, that there are many considerations which might make it a proper thing for such a regulation to be made under ordinary circumstances besides the paramount importance of public safety.

Speaking only for myself, I do not think that section, looking at its language and its objects, and at the power given the local authorities to vary it, can be said to be a general enactment of the character to which Mr. Russell has referred.

That being so, what are the facts in this particular case? The magistrates have found "The locomotive so driven by the appellant as aforesaid was the property of His Majesty, and the appellant was so driving the said locomotive in the course of his duty as such servant"—that was, as an authorized driver—"and in accordance with the instructions of his superior officer."

Now I wish myself to emphasize the fact that no question of nuisance arises here. There is no question of anything being done which was unnecessary, no question of any individual act by the driver, apart from the performance of his duty as a servant of the Crown, using the property of the Crown and under the direction of the Crown. Therefore the personal element of what a man may be charged with, either civilly or criminally, in consequence of his own conduct, cannot be justly and properly raised in this case. Indeed, it is not contended that it can. The contention is that, in order to justify the conviction, there must be a prohibition against the use in this particular place by anybody, including the Crown authorities, of a locomotive belonging to the Crown at a speed of above two miles an hour.

If that is the proposition, I think that this statute is not one which binds the Crown. I think that, in a case which has solely reference to the use of a Crown locomotive by a Crown servant in the performance of military duties, we ought to hold that the section does not prohibit that act, and does not bind the Crown in that sense.

1903

COOPER v. HAWKINS.

Lord Alverstone C.J.

It is perfectly obvious there must be many occasions when in the performance of military duties it would be absolutely necessary for locomotives to be driven at a greater speed than two miles an hour. I mention that, not only for the purpose of enforcing the argument, but of pointing out why there is no general principle why such a section should be held to bind the Crown.

I am, therefore, of opinion that this appeal ought to be allowed, and the conviction quashed.

WILLS J. I am entirely of the same opinion. I cannot help thinking that the fact that the section would, at the will of the local authorities, subject the persons who are engaged in the performance of duties of this kind to liabilities which, at the time this Act was passed, could not be known or foreseen, is a strong argument against the supposition that the Crown consented beforehand to allow itself to be bound by an Act of Parliament which provides for by-laws which may be imposed by local authorities. I do not know that there is any decision on the exact point. I rather think that there is not; but I think that the fact of there being a power in an Act for a local authority to make by-laws is a strong argument—I do not say it is conclusive—there may be other considerations which outweigh it—against holding that the Crown is bound by it.

I agree with my Lord that this is not one of those enactments of paramount importance to public safety which require that a great public department should be responsible if its servants, in the performance of their duty and acting under orders, should exceed the rate of speed which is provided for; and I cannot help thinking that many of the considerations which were relied upon in the judgment by my brother Day and myself in the case which has been cited are quite correct in principle, and are founded on very sound reasons; I cannot help thinking that they apply here, and apply, it seems to me, with rather more than usual force, because this is an Act of Parliament which, if it binds the Crown, must bind all the great departments of State, no matter what they are, and,

therefore, must bind the military department. Now the military department is of that character that to have this kind of interference might hamper the military service exceedingly. Occasionally soldiers are required, not as performing, in one sense, military duties, although under military command, to perform civilian duties and to act as good citizens by helping to put down disturbances and to keep the peace. Under such circumstances there may be a very paramount necessity for great speed being used in the conveyance of materials and of what is wanted for the performance of the duties which they are ordered to undertake in order simply to preserve the public peace. An army cannot exist, at least it cannot exist for any useful purpose, without there being opportunities for manœuvring and practising, which could not be carried out on any large scale if regulations of this kind were to be enforced.

These are mere illustrations, but they tend to shew that this is not an enactment which ought to be held to bind the Crown.

Of course, that does not exhaust the case, because although it might perfectly well be that the Crown is not bound by it, yet the circumstances might have been such that a man driving an engine which belongs to the Crown might be liable because the act of over-driving might be his own personal act. For instance, if the man were drunk, or under circumstances in which he was not performing a public duty, and was not acting in accordance with superior orders, he would be liable, although driving an engine belonging to the Crown; but in this case no such consideration arises. I understand from the case that the excess of speed was in conformity with orders. It may be that they were not orders specifically to go more than three miles an hour, but the driver was told, as I read it, that the coal was to be conveyed before nightfall to a particular place, and, as I understand, it was necessary, in order that that should be done, that he should go at a pace which exceeded the limits imposed by the section. If so, this is a case, beyond all doubt, in which the act of the man is the act of the Crown. If so, there cannot be any question, assuming we are right in holding

1903

COOPER v. HAWKINS.

that this Act does not bind the Crown, that the conviction was wrong.

CHANNELL J. I am of the same opinion, and have nothing to add.

Conviction quashed.

Solicitor for appellant: *The Solicitor to the Treasury.*

Solicitors for respondent: *Robbins, Billing & Co., for Barber, Winchester.*

A. P. P. K.

1904

Feb. 22; *March* 1.

SOUTH-WEST SUBURBAN WATER COMPANY *v.* GUARDIANS OF THE POOR OF ST. MARYLEBONE.

Water Company—Supply of Water for Domestic Purposes—School—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 48, 50, 53—*Waterworks Clauses Act*, 1863 (26 & 27 *Vict. c.* 93), *s.* 12.

The defendants, who were the occupiers of a school within the district supplied by the plaintiffs, demanded a supply of water for domestic purposes, but refused to comply with the regulations made by the plaintiffs:—

Held, that the school was a dwelling-house within the meaning of the Waterworks Clauses Acts, and that although a business was carried on there the defendants might still be entitled to a supply of water for domestic purposes, but that they must first comply with the reasonable regulations for that supply which the plaintiffs were entitled to make.

Pidgeon v. *Great Yarmouth Waterworks Co.*, [1902] 1 K. B. 310, commented on.

ACTION tried before Buckley J. (sitting as a judge of the King's Bench Division) without a jury.

The plaintiff water company were constituted by the South-West Suburban Water Act, 1883, which incorporated the Waterworks Clauses Acts and the Norwood Middlesex Water Order, 1878, and were authorized to supply water in the parish of Norwood, in the county of Middlesex. The defendants were the owners and occupiers of premises within the parish, where they had erected and maintained schools for the education of children from the workhouse of the parish of St. Marylebone.

1904

SOUTH-WEST SUBURBAN WATER COMPANY v. ST. MARYLEBONE UNION.

Down to March 25, 1902, the plaintiff company had, under an agreement, supplied these schools with water at the rate of 1*s.* per 1000 gallons, the amount supplied being ascertained by meter. By consent, a communication pipe with a bore of three inches had been connected with the plaintiffs' mains, and a by-pass and valve had been fixed to allow the use of water, which did not pass through the meter, in case of fire.

The defendants used the water supplied for the following purposes, which were thus stated in paragraph 4 of the statement of claim: (*a*) for garden and greenhouse supply; (*b*) for automatic flush-cisterns with continuous action; (*c*) for a continuous supply to urinals; (*d*) for hydrants; (*e*) for boilers for driving machinery and pumping water; (*f*) for use in the laundries for the purpose of laundry work, and for teaching this work to the girls of the schools; (*g*) for washing out a large swimming-bath.

On December 6, 1901, the plaintiffs gave the defendants notice to terminate the agreement, and offered to enter into a new agreement for the supply of water. On March 10, 1902, the defendants resolved to require the plaintiffs to supply water for domestic purposes, and to discontinue the supply for the use of the swimming-bath. The plaintiffs replied that if a supply for domestic purposes only were needed, the pipe with a bore of three inches must be replaced by a half-inch service-pipe, and that the defendants must make certain other alterations so as to disconnect the supply for purposes not domestic, and expressing their willingness to supply from March 25 water for domestic purposes only at a charge based on the annual value of the premises. The defendants refused to allow any alterations to be made beyond disconnecting the swimming-bath, and after considerable correspondence the plaintiffs demanded payment for water supplied on the basis of so much per 1000 gallons, and the defendants tendered payment on the footing of a charge based upon the annual value. The tender was refused, and the present action commenced.

Danckwerts, K.C., and *George Wallace*, for the plaintiffs. The defendants are demanding to be supplied as for domestic

1904

SOUTH-WEST SUBURBAN WATER COMPANY v. ST. MARYLEBONE UNION.

purposes with water which they use for the purpose of carrying on a business: *Rolls* v. *Miller* (1); *Barnard Castle Urban Council* v. *Wilson*. (2) The schools cannot be regarded as a dwelling-house: *Riley* v. *Read* (3); *Charterhouse School* v. *Gayler*. (4) At any rate, they cannot insist on a supply of water for domestic purposes till they have complied with the reasonable regulations of the plaintiffs.

Macmorran, K.C., and *R. Cunningham Glen*, for the defendants. An occupier of a house may carry on a business there and yet be entitled to a supply of water for domestic purposes: *Pidgeon* v. *Great Yarmouth Waterworks Co.* (5); *Liskeard Union* v. *Liskeard Waterworks Co.* (6); *Smith* v. *Müller* (7); *Cooke* v. *New River Co.* (8)

In considering the question whether water is used for domestic purposes or not, regard must be had to the ordinary habits of the inhabitants of the building, and a wide meaning must be given to the expression "domestic purposes": *Bristol Waterworks Co.* v. *Uren* (9); *Weaver* v. *Cardiff Corporation*. (10)

Danckwerts, K.C., in reply.

Cur. adv. vult.

March 1. The following judgment was read by

BUCKLEY J. The plaintiffs are a company who under an order of 1878 supply water to the district within which are situate certain pauper schools belonging to the defendants, the guardians of the poor of St. Marylebone. On December 6, 1901, the plaintiffs gave the defendants notice to terminate, on March 25, 1902, an agreement then subsisting between the plaintiffs and the defendants for the supply of water to the schools, offering at the same time to enter into a new agreement for the further supply of water. The agreement thus terminated was one by which the defendants paid a certain

(1) (1884) 27 Ch. D. 71.
(2) [1902] 2 Ch. 746.
(3) (1879) 4 Ex. D. 100.
(4) [1896] 1 Q. B. 437.
(5) [1902] 1 K. B. 310.
(6) (1881) 7 Q. B. D. 505.
(7) [1894] 1 Q. B. 192.
(8) (1889) 14 App. Cas. 698.
(9) (1885) 15 Q. B. D. 637.
(10) (1883) 48 L. T. 906.

price per 1000 gallons by meter, and for its supply a three-inch service pipe had been laid. On March 10, 1902, the defendants passed a resolution to demand of the plaintiffs a supply of water for domestic purposes for the schools on the annual rack-rent or value of their premises, discontinuing at the same time any supply for the use of the defendants' swimming-bath. On March 11, 1902, the defendants communicated to the plaintiffs that resolution. On March 20 the plaintiffs wrote to the defendants that, inasmuch as the defendants required a supply for domestic purposes only, the three-inch service pipe must be disconnected and a half-inch service pipe substituted, and that certain alterations which the plaintiffs briefly indicated must be made by the defendants in their system so as to disconnect the supply from purposes not of a domestic nature. The letter concludes by stating that the plaintiffs will supply as from March 25 water for domestic purposes, for which the charge would be based upon the annual value of the premises. On March 24 the defendants replied that they had instructed the superintendent of their schools neither to make nor to allow any alterations to the schools or service mains connected with the supply of water except to disconnect the swimming-bath, and they sent a copy of a resolution which the defendants had passed that the defendants' solicitors be instructed to resist any action on the part of the plaintiffs to avoid the defendants' resolution of March 10, and that the solicitors be instructed to enforce the provisions of that resolution on the part of the defendants. In adopting this attitude the defendants, in my opinion, were wholly in the wrong. From what follows it will appear that some of the purposes for which the existing supply was then used were not domestic purposes, and that the supply so far as used for domestic purposes was used by the defendants in manner not permissible by the plaintiffs' regulations duly made under the order of 1878. The plaintiffs were, I think, within their rights in requiring that, before the supply at a charge based upon the annual value was made, the necessary proper alterations should be carried out in the defendants' system. On June 5, 1902, the plaintiffs, having been allowed inspection

1904

SOUTH-WEST SUBURBAN WATER COMPANY v. ST. MARYLEBONE UNION.

Buckley J.

of the defendants' water services, gave details of the alterations which the plaintiffs said were necessary. On June 25 the defendants in reply simply referred to their previous resolution demanding a supply for domestic purposes. On June 30 the plaintiffs replied that if the guardians wished for a domestic supply only they must comply with the plaintiffs' previous request. The defendants, however, refused to make any alteration at all. What happened subsequently was that the plaintiffs demanded payment upon the footing of so much per 1000 gallons, and the defendants on their part tendered payment upon the footing of an annual charge based on the annual value. This tender the plaintiffs did not accept. The plaintiffs very properly did not take the extreme course of cutting off the supply, but by writ issued on April 17, 1903, commenced the present action.

The relevant statutory provisions are shortly as follows: The order of 1878 incorporates the Waterworks Clauses Act, 1847. By s. 48 of that Act any owner or occupier of a dwelling-house may lay pipes from the undertakers' pipes into his premises. By s. 50 the bore of any such pipe is not to exceed the prescribed limits, or, if none be prescribed, is not to exceed half an inch, except with the consent of the undertakers. By s. 53 every owner and occupier of a dwelling-house shall, when he has laid his communication pipes, be entitled to demand and receive a sufficient supply of water for his domestic purposes. By s. 35 the undertakers are to provide a supply of water sufficient for the domestic use of all the inhabitants, who shall be entitled to demand a supply. By the Waterworks Clauses Act, 1863, s. 12, a supply of water for domestic purposes is not to include, amongst other things, a supply for any trade, manufacture, or business. By the order of 1878, s. 17, the undertakers shall, at the request of the owner or occupier of any dwelling-house, furnish a sufficient supply for domestic purposes. By s. 19 the undertakers may make and enforce reasonable regulations for preventing the waste or misuse of water, and may prescribe the pipes, cocks, cisterns, and apparatus suitable for the purposes of supply. By s. 20, in the event of the regulations not being observed, the undertakers may refuse to supply, or may cut off the supply, unless

and until the regulations are complied with, and any difference as to whether the regulations are reasonable or have been complied with may be referred by either party to, and shall be settled by, two justices. By s. 21 the undertakers may supply with water for other than domestic purposes for such remuneration and upon such terms as may be agreed. From the statement which I have made of the correspondence between the plaintiffs and the defendants it will be seen that the plaintiffs did not thereby deny the right of the defendants to receive a supply for domestic purposes upon complying with proper conditions. By their statement of claim, however, and at the bar, they have put forward a contention that the defendants are not entitled except by agreement to a supply for domestic purposes at all. This contention is based upon an argument that the purposes of these schools constitute a business; and that s. 12 of the Act of 1863 excludes them from a supply for domestic purposes. Even if (which is not here the case) the premises were occupied, not as a dwelling-house by persons resident and sleeping there, but purely for the purposes of a business—say, of a factory—I should not be prepared to hold, at least without further argument, that, even in that case, the supply of water for what I may call sanitary purposes—such as supplying washhand-basins or the ordinary flushing of water-closets—could be refused upon the mere ground that no one, or only a caretaker, slept upon the premises. It is noticeable that for domestic purposes there is a right to demand a supply, and that there is no right to demand a supply for other purposes. It is the character of the purpose, not the character of the premises in which the water is used, that is here the important factor. The test of residence is not a test of the purposes of user. If the contention be well founded, a factory would be excluded from a right of supply for even sanitary purposes—a conclusion at which I should be very slow to arrive. The contention rests upon the basis that a house is not a dwelling-house unless the residence in or occupation of the house extends to sleeping in it. In *Cooke* v. *New River Co.* (1) Lindley L.J., speaking,

(1) (1888) 38 Ch. D. 56.

1904

SOUTH-WEST SUBURBAN WATER COMPANY v. ST. MARYLEBONE UNION.

Buckley J.

no doubt, of a different Act expressed in different terms, says (1): "I am disposed to think that anything is a dwelling-house within the meaning of this section which is a house and in which water is required for domestic purposes, or for any other purposes for which rates are fixed." As at present advised I think this is true of the Waterworks Clauses Acts. Upon the same point I refer to *Smith* v. *Müller*. (2) The point, however, does not arise in this case, for these schools are occupied by children, and by those who govern and control them, being persons who are all resident on the premises. There is no question, in my opinion, but that these premises constitute a dwelling-house: *Liskeard Union* v. *Liskeard Waterworks*. (3) As a dwelling-house they are, I think, entitled to a supply for domestic purposes, if such premises can be spoken of as having domestic purposes. But, granting that the schools are a dwelling-house, the next contention of the plaintiffs is that these premises have not and cannot have domestic purposes because that which is carried on upon the premises is a business, and that all the supply is for the purposes of that business, and they say that s. 12 of the Act of 1863 applies. I agree that these premises are used to carry on a business. If I were to define the business carried on I should say that it is the business of providing for, maintaining, and training pauper children, and that this is none the less a business because it is carried on, not for profit, but, on the contrary, at a large expense. It was held in *Rolls* v. *Miller* (4) that a home for working girls is a business. This, no doubt, was upon a covenant which involved some considerations not relevant here, but the reasoning in that case is, I think, applicable to the present case. But, although that which is carried on upon the premises is a business, it is, in my opinion, perfectly consistent that in business premises water may be wanted for domestic purposes. The question is what is the character of the purpose, not what is the character of the place of user. Thus a boarding-house is a business, but persons in a boarding-house may and do want water for domestic

(1) 38 Ch. D. at p. 66.
(2) [1894] 1 Q. B. 192.
(3) 7 Q. B. D. 505.
(4) 27 Ch. D. 71.

purposes: *Pidgeon* v. *Great Yarmouth Waterworks Co.* (1) The inhabitants of a workhouse, although maintained for a public purpose, can demand water for domestic purposes—that is to say, for use within the workhouse for purposes which are domestic as distinguished from purposes of trade: *Liskeard Union* v. *Liskeard Waterworks.* (2) If within the same premises water is required both for domestic purposes and for trade purposes the solution of the matter is, I think, that there must be two supplies—the one for that which can be demanded, and for which payment is to be made upon the rateable value of the premises, and the other for that which cannot be demanded, and can be taken only by agreement at such price as may be agreed, based probably upon the consumption as ascertained by meter. If, therefore, the defendants here wanted water for two such purposes the plaintiffs were, I think, right in saying, "As to the supply which you demand for domestic purposes, put yourselves in a position to confine the user to domestic purposes, and we will give you the supply." As to the rest, the matter would have to await agreement between the parties. It remains to investigate whether the purposes to which the defendants put the water supplied were wholly, or in part, and to what extent respectively domestic and not domestic, and, so far as they were domestic, whether the plaintiffs' reasonable regulations were complied with. The short way to deal with this is to indicate such as were not domestic and such as, being domestic, were not taken in accordance with the regulations. It is convenient here to refer to paragraph 4 of the statement of claim. As to (*a*), no one says, having regard to s. 12 of the Act of 1863, that water for garden and greenhouse supply is domestic. Further, the defendants do not say that (*g*) water for washing out the swimming-bath is domestic. As appears by the correspondence, they had ceased to require any supply to the swimming-bath before the dispute arose. The matters which remain fall substantially under the following heads: (*b*) Automatic flushing cisterns with a continuous action by day and by night. Of these there are ten of capacity from forty to ninety gallons

(1) [1902] 1 K. B. 310. (2) 7 Q. B. D. 505.

1904

SOUTH-WEST SUBURBAN WATER COMPANY v. ST. MARYLEBONE UNION.

Buckley J.

discharging twelve or fifteen times in the twenty-four hours at a total consumption of 6180 gallons for twenty-four hours, equal to 1,265,700 gallons per annum. The plaintiffs have made regulations under s. 19 of the order. These automatic cisterns are in breach of the regulations. There are forty water-closets flushed from fixed cisterns. By regulation No. 21 no cistern for a water-closet must deliver more than two gallons at a flush; thirteen of these water-closets discharge two and a half gallons, and twenty-six discharge three gallons, at a flush. These are in breach of the regulations. The observation upon this head is not that the water is not taken for a domestic purpose, for in my judgment it is; but that it is taken in a way not allowed by the regulations, which seem to me reasonable, and which, until two justices under s. 20 of the order shall have held otherwise, I take to be reasonable. By s. 20 of the order the undertakers may refuse to supply until those regulations are complied with. The next head (*c*) is for a continuous and constantly running supply for urinals. This continuous flow is in breach of the regulations. My observation on this is the same as on the previous head (*b*). The next head (*d*) is for hydrants. Of these there are eleven. There has, happily, never been occasion to use them for purposes of fire, for which they are intended, but they are used for washing purposes by attaching a hose and washing the yards and paths of the premises. This, I think, is a domestic purpose, but, again, it is in breach of regulation 28. It is obvious that a very large amount of water may thus be used which may be unreasonable. The next head (*e*) relates to three large Lancashire boilers, which are used for three purposes. First for heating water for warming the buildings by circulation. This seems to me to be a domestic purpose. But, secondly, they are used for purposes of power, to drive machinery of two classes; the one is machinery which is used in the laundry, and the other is certain pumps, which are employed for raising water from certain wells which the defendants have on their ground. In my opinion the supply of power for the above is not a domestic purpose. Reading the judgment of the Court of Appeal in *Barnard Castle Urban*

District Council v. *Wilson* (1), it seems to me that the wide scope which Vaughan Williams L.J. there thought should be given to the words "domestic purposes" was not adopted by the other two members of the Court. It is plain that it was not adopted by Romer L.J. It is a little more difficult to say what was the view of Stirling L.J. But I think the result of the case is that in arriving at a decision on the words "for domestic purposes" regard is to be had to that which is reasonable having regard to the purposes for which, according to the ordinary habits of domestic life in this country, people require water in their houses. As to the particular question of the use of water for power, I refer to what Romer L.J. says at the top of p. 756, that to use water at high pressure to drive a dynamo for purposes of lighting by electricity is not a domestic purpose. I think the same is true of the use of water to generate steam for purposes of power. I notice that in *Pidgeon* v. *Great Yarmouth Waterworks Co.* (2) Channell J. seems to have thought, although Darling J. certainly did not, that I had in the *Barnard Castle Case* (3) when it was before me held that the use of water for a large swimming-bath in a private house would be use for a domestic purpose. I think it well to point out that I decided nothing of the kind. Counsel for the plaintiff before me admitted that water for a swimming-bath in a private house would be for a domestic purpose, and although I used some pressure to induce him to argue the contrary (for my opinion was the other way), I did not succeed in arriving at that result. All that I decided was that, it being conceded that a swimming-bath in a private house would be for a domestic purpose, the same proposition was true in the case with which I had to deal. I thought the swimming-bath there was not educational, and if a swimming-bath in a private house would be domestic, the affirmative of which the plaintiff admitted there, I, upon that hypothesis, thought it was domestic. The Court of Appeal only differed from me on the question of fact, and held that the swimming-bath there was educational. Under these circumstances they

(1) [1902] 2 Ch. 746. (2) [1902] 1 K. B. 310.
(3) [1901] 2 Ch. 813.

1904

SOUTH-WEST SUBURBAN WATER COMPANY v. ST. MARYLEBONE UNION.

Buckley J.

had not to decide whether it could have been justified as domestic. If they had had to decide the point I think they would not have been unanimous in opinion. I think the true result of the cases is that the words "domestic purposes" include user, not merely for washing, drinking, flushing closets, and the like, but extend to user for what in the *Bristol Waterworks Co.* v. *Uren* (1) were called the amenities of the house, but that the limits of such amenities must be ascertained with due regard to what is reasonable and what is the ordinary user in our day. This user of the boilers for power is not, in my opinion, a user for domestic purposes. Thirdly, the boilers are used for laundry purposes. Here a subdivision is necessary. So far as they are employed for power to drive laundry machinery, the purpose is not, in my opinion, domestic. So far as they are employed simply for the supply of hot water for laundry purposes the user is, I think, domestic. The latter, again, is said to require a sub-qualification. To some extent the laundry is used for educational purposes. A few of the elder girls go there, one at a time, say three days in a week, to be taught laundry work in the laundry. Strictly, no doubt this is educational and not domestic. But the matter is too small to be worth attention. A parallel case would be a case where a mother sent her daughter into the laundry on washing days to learn something of the laundry maid. As regards the bore of the service pipe, s. 50 of the Act of 1847 provides that it shall not exceed the prescribed limits, and where no limit is prescribed shall not exceed half an inch, except with the consent of the undertakers. No. 12 of the plaintiffs' regulations allows a bore of half an inch or three-quarters of an inch for the service of a supply for domestic purposes. The defendants are, I think, entitled (if and when they put themselves in a position to take a domestic supply) to use a pipe of three-quarters of an inch bore, but not a larger bore without the plaintiffs' consent. I find nothing to limit them to one such pipe. They are entitled to so many pipes of a bore of three-quarters of an inch as are necessary for obtaining a sufficient supply within s. 53 of the Act of 1847.

(1) 15 Q. B. D. 637.

For the determination of this action it is sufficient to say that the defendants have not at any time during the period in respect of which the plaintiffs sue for payment put themselves in a position to demand a supply for domestic purposes. It results that the plaintiffs are entitled to payment upon the basis of the fair value of the amount of water supplied. It is, therefore, not necessary for the determination of this action to declare which of the purposes to which the water is at present supplied are and which are not domestic purposes. It is sufficient that some of them are not domestic, and that as regards such as are domestic the regulations are not complied with. For the guidance of the parties I have endeavoured to express as clearly as I can which are of the one and which are of the other character. But it is unnecessary, and I think inexpedient, to introduce into the order declarations addressed specially to each case. For instance, as regards the water to the boilers, the question whether the supply to them is domestic or not domestic turns upon the uses to which the boilers are put. Again, the supply to the flushing cisterns is objectionable, not because the flushing of water-closets is not a domestic purpose, but because the nature of the user which the defendants make is in breach of the plaintiffs' regulations. If, hereafter, any question should arise as to whether any particular user is domestic or not domestic, or is in breach of the regulations, it should be raised, I think, in a concrete form. The order which I make is as follows: I declare that the defendants, upon complying with the reasonable regulations for the time being lawfully made by the plaintiffs, under s. 19 of the order of 1878, will be entitled to a supply for domestic purposes at the rate provided for by the same order. I declare that the defendants are not entitled without the plaintiffs' consent to have or maintain for that purpose any pipe with a bore exceeding three-quarters of an inch communicating with the plaintiffs' pipes, or to have the by-pass and valve mentioned in the statement of claim. I declare that the defendants had not, during the period over which the plaintiffs seek to recover payment in this action, complied with such regulations or provided a pipe or pipes

1904

SOUTH-WEST SUBURBAN WATER COMPANY v. ST. MARYLEBONE UNION.

Buckley J.

of the bore lawfully usable for that purpose, and had not become entitled to a supply for domestic purposes. I declare that the plaintiffs are entitled in this action to payment upon the basis of a supply by meter at a reasonable price per 1000 gallons. I hope the parties will agree as to what is a reasonable price; but if not, I must put that in course of trial in a proper manner, for it has not been the subject of evidence before me. There will be one order in the action and counter-claim. The defendants must pay the costs of both the action and counter-claim.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Bolton & Co.*
Solicitors for defendants: *Clarkson, Greenwell & Co.*

A. P. P. K.

1904
April 18, 19.

SMITH (SURVEYOR OF TAXES), APPELLANT; DAUNEY, RESPONDENT.

Revenue—House Duty—"Inhabited Dwelling-house"—Occupation—House not lived in during Year of Assessment—House Tax Act, 1851 (14 & 15 *Vict. c.* 36), *s.* 1.

Where the owner of a house, who has lived in it or let it as a furnished dwelling-house, keeps it furnished and ready for habitation as a dwelling-house, he is assessable in respect thereof to inhabited house duty under s. 1 of the House Tax Act, 1851, notwithstanding that during the year of assessment no person has lived or slept in the house.

CASE stated, under 43 & 44 Vict. c. 19, s. 59, by two Commissioners of Income Tax for the division of the Isle of Wight.

At a meeting of the Commissioners the respondent appealed against an assessment to inhabited house duty for the year ending April 5, 1901, made upon the annual value of a dwelling-house belonging to him at Shanklin, in the Isle of Wight.

The material facts were agreed upon as follows:—

The premises in question, with a garden attached, were held

1904

SMITH v. DAUNEY.

by the respondent under a lease for years. The respondent furnished the house in 1877, and it was furnished during the year of assessment, and still remains so furnished. The premises were purchased by the respondent with the intention primarily of using them occasionally as a country residence for himself and his family, and up to the year 1895 he resided with his family in the house for a few weeks in most years. In 1896 he let the house as a furnished residence to a tenant whose tenancy expired in 1898. In each year since 1898, with the exception of the year of assessment (1900–1901), the house has been let by the respondent as a furnished house for a few weeks, but the respondent, or his family, have only resided in the house for about a month in 1902.

At no time during the year of assessment was the house let or actually resided in by any person whomsoever; nor, subject to what is afterwards stated, was any caretaker employed to look after it.

During the year of assessment the house was only used by the respondent for keeping his furniture in. The furniture was not packed away, and the carpets were kept down, and the premises were ready for the use of the respondent or any person to whom he might let them as a furnished residence. The keys were kept by the respondent's agent at Shanklin, and the windows and doors of the house were occasionally opened by the agent for the purpose of airing it. A gardener was employed by the respondent once or twice a week for the purpose of attending to and keeping in order the garden.

For the year of assessment and for the previous and subsequent years the respondent paid income tax under Sched. A, land tax, and poor and other rates in respect of the house, being assessed as the occupier thereof, and he had also paid inhabited house duty except for the year of assessment.

On the above facts the Commissioners came to the conclusion that the house was not during the year of assessment an "inhabited dwelling-house" within the meaning of the House Tax Act, 1851 (14 & 15 Vict. c. 36), s. 1, and they therefore disallowed the assessment, and stated this case on the application of the appellant.

1904

SMITH v. DAUNEY.

Sir Edward Carson, *S.-G.*, and *S. A. T. Rowlatt*, for the appellant. The house in question was an "inhabited dwelling-house" within the meaning of s. 1 of 14 & 15 Vict. c. 36, which repealed the window tax payable on dwelling-houses, and granted in lieu thereof the inhabited house duty—a tax which had existed under earlier Acts, but had been repealed in 1834. By s. 1, "there shall be assessed, raised, levied, collected, and paid upon inhabited dwelling-houses in and throughout Great Britain the several duties set forth in the schedule to this Act annexed, payable according to the annual value of such dwelling-houses." Sect. 2 provides that the duties imposed by the Act shall be denominated and deemed to be duties of assessed taxes, and shall be under the care and management of the Commissioners of Inland Revenue, and that the powers, provisions, &c., in force of any Act or Acts relating to the duties of assessed taxes, and also the powers, provisions, exemptions, &c., contained in those Acts with reference to the duties on inhabited dwelling-houses set forth in Sched. B to 48 Geo. 3, c. 55, shall severally and respectively become of full force and effect and apply with respect to the duties imposed by this Act as fully and effectually as if they were repeated and re-enacted therein. On referring to the various powers and provisions incorporated by s. 2, it will be found that the test to be applied in making the assessment is always whether or not the house is "occupied." The whole of the machinery for making an assessment depends upon "occupation," and not upon habitation. Sect. 10 of 43 Geo. 3, c. 161, gives the procedure for making an assessment in respect of the window tax under Sched. A, and in respect of the tax on "inhabited dwelling-houses" under Sched. B, of that Act. It provides that "every dwelling-house, cottage, or tenement, of whatever description, occupied at the time of making the assessment shall be brought into charge in respect of the duties set forth in Sched. A by the respective assessors according to the number of windows therein, subject to the powers of discharging the same as after mentioned; and every dwelling-house, cottage, or tenement, and other the premises therewith occupied, and hereby charged, as set forth in Sched B, ... shall also be brought into charge

in like manner"; and a penalty is imposed upon any assessor or assessors who shall omit, in the assessment of the duties set forth in Scheds. A or B, to charge the "occupiers," "whether the occupier of any such house, cottage, or tenement, shall be entitled to be discharged from the same in manner hereinafter mentioned or not." An assessor, therefore, finding a house "occupied" must assess it whether it be inhabited or not. In the present case the respondent "occupied" the house during the year of assessment; for the leaving of furniture in a house has always been held to be a sufficient occupation for the purposes of the poor-rate under 43 Eliz. c. 2, and other rating purposes. Sect. 15 of 43 Geo. 3, c. 161, deals with houses "which shall happen to be unoccupied at the time of making the assessment." They are to be inserted as such in the assessment, and the assessors are to cause the same to be certified to the Commissioners from the time of the house "coming into the occupation of any person or persons." The incoming occupier is to give notice to the assessor within twenty days after his coming into occupation, and is to be charged with the duties from the end of the preceding quarter; and where notice is given that a house has "become unoccupied" within the year, the Commissioners may, in their discretion, discharge the assessment or direct the duties to be levied according to the directions of the Act. By the House Tax Act, 1808 (48 Geo. 3, c. 55), the duties payable on inhabited houses were altered, and throughout the rules contained in Sched. B of that Act the duties are to be charged on "occupiers." By the House Tax Act, 1825 (6 Geo. 4, c. 7), s. 2, provision is made for the case of houses becoming unoccupied after the assessment is made, whether at the expiration of the owner's lease or not, and the Commissioners are to discharge the duty for the particular quarter or quarters of the year of assessment during which the house shall have continued for each entire quarter "wholly empty and unoccupied"; and where houses have only been built and completed for occupation after the assessment has been made, they are to be assessed only for that portion of the year during which the house "shall be actually occupied." Again, s. 13 of the Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15),

1904

SMITH v. DAUNEY.

provides with respect to inhabited house duties that the Commissioners shall grant relief "to the person chargeable as occupier of the house" from the duty charged in the assessment where a house, being one property, shall be divided into, and let in, different tenements, and any of such tenements are occupied solely for the purpose of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, or are unoccupied. It follows from these and other like statutory provisions that a house in the condition in which the respondent's house was during the year of assessment—namely, furnished, and therefore occupied, and kept ready for habitation as a dwelling-house, though not lived in—is assessable to inhabited house duty under 14 & 15 Vict. c. 36. There is no express decision on the point, but there are dicta in several of the Scottish cases which strongly support the contention for the Crown: *In re Glasgow Coal Exchange Co., Ld.* (1), judgment of the Lord President; *In re Scottish Widows' Fund Life Assurance Society* (2), judgment of the Lord President; *Corporation of Glasgow* v. *Inland Revenue* (3), judgment of the Lord President.

[They also referred to *London Library* v. *Carter* (*Surveyor of Taxes*). (4)]

A. T. Lawrence, K.C., and *C. C. Scott*, for the respondent. The words "inhabited dwelling-houses" must be construed according to their plain ordinary meaning; the argument for the Crown really seeks to read the word "inhabited" as "uninhabited." The various provisions of the earlier Acts incorporated by s. 2 are only machinery; they only apply, in respect of the inhabited house duty, to houses which were inhabited as dwelling-houses during some portion of the year of assessment, and they apply to assessments to the window tax as well as to inhabited house duty. There is a clear distinction between the window tax and the inhabited house duty. Occupation at the time of making the assessment is made a necessary condition for charging the window tax, and an

(1) (1879) 1 T. C. 211, at p. 213; 17 Sc. L. R. 317.
16 Sc. L. R. 457.
(2) (1880) 1 T. C. 245, at p. 251; (3) (1880) 18 Sc. L. R. 1, at p. 3.
(4) (1890) 2 T. C. 594.

inhabitant occupation during some part of the year of assessment is the condition for charging the inhabited house duty. Sect. 10 of 43 Geo. 3, c. 161, applies to both; but Scheds. A and B are carefully kept distinct throughout that section. The words "and every dwelling-house, cottage, or tenement, and other the premises therewith occupied, and hereby charged, as set forth in Sched. B" shew that habitation, as distinct from occupation, was thought to be necessary in respect of some part of the premises to be taxed under Sched. B. The rules in Sched. B give special instances of houses which are not inhabited but are to be treated as if they were inhabited dwelling-houses, and the sections of the Act which have been referred to had to deal with those houses in respect of their being occupied or unoccupied. Case 5 of Sched. B gives an exemption from inhabited house duty where a person lives in the house who is a caretaker only. That exemption would be unnecessary if it were true that mere occupation of the house were sufficient. Although some of the Scottish judges seem to have treated the matter differently, in England the view has prevailed that in order to become subject to the inhabited house duty the house must be slept in during the year of assessment: *Riley* v. *Read* (1); *Clifton College* v. *Tompson*. (2)

[They also referred to *Grant* v. *Langston*. (3)]

S. A. T. Rowlatt replied.

CHANNELL J. In this case a point of some nicety is raised upon facts which are somewhat peculiar. There is a house which, during the whole of the year of assessment, was fully furnished and ready for occupation as a dwelling-house; but in point of fact during that year nobody slept in it or inhabited it in the ordinary sense of physically inhabiting it or living there. It was a house which the owner himself had formerly from time to time been in the habit of living in, with his family, as his country residence, and in recent years at any rate he had been in the habit of letting it furnished to other persons for occupation in a similar way; but when he was not

(1) (1879) 4 Ex. D. 100. (2) [1896] 1 Q. B. 432.
(3) [1900] A. C. 383.

1904

SMITH v. DAUNEY.

Channell J.

there himself, and had not let the house, he did not leave any servant or caretaker living in it. A house agent living close by kept the key of the house, and he, I suppose, shewed persons over it when necessary, and he also occasionally sent in some one to open the windows and air the house; but at no time during the actual year of assessment was it lived in in the ordinary way. It was ready for use and for habitation as a dwelling-house, but it was not in fact inhabited. It was, however, occupied, because it is clear that leaving the furniture in a house in the way in which it was left here is an occupation of the house. It is a use of the house to a certain extent, and for the purpose of the poor-rate and for other purposes has always been treated as occupation. I do not think it is questioned that what happened in this case did amount to occupation, although it is said, and in the ordinary sense of the word rightly said, that the house was not inhabited. Under these circumstances the question arises, Is inhabited house duty payable in respect of this house? It is clear that the duty is imposed in respect of all inhabited houses—not habitable houses, but inhabited houses. It was so with reference to the earlier Acts, and it is so with reference to the Act, 14 & 15 Vict. c. 36, which reimposed inhabited house duty. It was a tax which had been in existence and had been taken off a few years before, and when this Act was passed the window tax—another tax which had existed for a great number of years—was taken off, and the inhabited house duty was restored. Sect. 1 imposes the duty "upon inhabited dwelling-houses in and throughout Great Britain," and by s. 2 the provisions contained in any Act or Acts relating to the duties of assessed taxes with reference to the duties on inhabited dwelling-houses shall become in force with respect to the duties as reimposed. Now, when one comes to look at those various provisions, it will be found that in all of them which deal with the mode of charging the duty in reference to the period during the year of assessment for which relief from the duty is to be granted the word that occurs is "occupied," and not "inhabited," and it appears as if the Legislature were treating the two words as meaning the same thing. Unless

you can say that "inhabited" means "occupied," or "occupied" means "inhabited," you get into difficulties at once with reference to some one or other of the sections throughout the Act, and there is a substantial difficulty in seeing how the thing is to be worked out. But before I go to the statutes I will refer to the dicta, for I do not think there is any direct decision, upon the point before me. In Scotland it has been stated in several cases, and particularly in *Corporation of Glasgow* v. *Inland Revenue* (1), where it is stated emphatically and clearly, that for the purposes of this statute habitation is the same thing as occupation. In that case the Lord President said in giving judgment: "It is needless to say at this time of day that an inhabited house does not mean a place of residence—that habitation in the sense of the statute may consist of any kind of occupation of a house or building. If it be not unoccupied—that is to say, without any use being made of it at all—then it is an occupied house within the meaning of the Act, and being occupied it is also within the meaning of the statute an inhabited house." If that passage correctly states the law of England as well as of Scotland—and there is no reason why it should not, because the Act extends to the whole of Great Britain—then the present case seems to me quite clear. It was suggested, however, that there were dicta to the contrary in English cases. The principal and latest dicta, which I should be inclined to follow if it were quite clear that they applied to this case, are in the judgment of my brother Wright in *Clifton College* v. *Tompson*. (2) The question there was whether inhabited house duty was payable in respect of the head-master's house and other buildings at Clifton School, and my brother Wright, after dealing with another point, said (3): "Then, that being so, the only ground upon which the Crown could succeed would be, that the college is assessable for the remainder of the premises, as being a dwelling-house, or as including some other dwelling-house, to which the rest is attached, and occupied with that dwelling-house. But the premises which

(1) 18 Sc. L. R. 1.
(2) [1896] 1 Q. B. 432.
(3) [1896] 1 Q. B. 432, at pp. 435, 436.

1904

SMITH v. DAUNEY.

Channell J.

I have just mentioned" (he was referring to the chapel, library, sanatorium, gymnasium, class-rooms, and similar buildings) "do not appear to me to be capable of being treated as inhabited dwelling-houses at all. Boys do not dwell in or inhabit any class-room or gymnasium, or any of these other places; they neither dwell there nor inhabit there; nor does anybody else, so far as the case shews. Then, in addition to that, on the second point to which I have adverted" (I think that must mean "the second point to which I am adverting") "it appears to me that the weight of authority in this country is to the effect that nothing is inhabited as a dwelling-house for the purposes of these Acts unless some one sleeps there. It is not necessary for us to express any opinion upon that point, but that seems to me on the whole to be the conclusion to which the authorities in this country, as distinguished from Scotland, lead." He had, no doubt, been referred to some of the Scottish and to some of the English cases, but not to many cases, and he deals with the point in that short way in his judgment. Now, if I knew exactly to what authorities the learned judge was referring, and if I thought that he had this precise point in his mind, I think I ought to follow his statement of the law. But, in the first place, he does not say what the authorities in this country, on which he arrives at his conclusion, are; and, in the second place, I think he was rather referring, not to the fact that somebody did or did not sleep there, but to the character and to the use made of those places—the chapel, library, gymnasium, class-rooms, &c. I do not think he meant to say that if those places included a bedroom for a caretaker, or some person of that kind, the assessability to inhabited house duty would depend upon whether or not that bedroom was slept in during the year of assessment. I think he was rather referring to the character of the occupation of the various buildings, and pointing out that it was not accommodation which included sleeping accommodation, and he was laying stress, not only upon the word "inhabited," but upon the phrase "inhabited dwelling-house." If so, as those expressions of opinion were only dicta, and there are clear expressions of opinion to the contrary in the Scottish cases, this point seems

to me to be practically left open; so that I must go back and look more carefully at the statutes in order to decide it. It seems to be expressly admitted, and to my mind necessarily admitted, in this case, that if the respondent in the year of assessment had done that which he has done in most of the years since he has had the house—that is, if he had lived in it, or let it, for a few weeks—then he would have been assessable to inhabited house duty for the entire year. All the provisions which deal with dividing up the year of assessment into periods for which the tax is to be paid and periods for which it is not to be paid clearly seem to deal with occupation, and not habitancy. In all of them the word used is "occupied," and the test is, when the house comes to be occupied and when it ceases to be occupied. It is "occupation" that governs the question whether or not a portion of the year is a portion in respect of which the tax ought to be paid. That being so, if it be correct to say that this house would have been taxable for the entire year if the respondent had left it for the greater part of the year in exactly the same condition as he did leave it, but had gone and lived there for a month in the summer with his family and servants, then one has to see how that would come about. It would come about, I think, in this way: When the assessment has to be made, and the person whose duty it is to make it goes to the house and finds it furnished, and in that sense occupied, he has not to inquire whether anybody slept there the night before, or whether anybody is going to sleep there that night; he has to assess it. That appears, I think, from ss. 10 and 15 of the Act of 1803 (43 Geo. 3, c. 161). Sect. 10 provides that "every dwelling-house, cottage, or tenement, of whatever description, occupied at the time of making the assessment, shall be brought into charge in respect of the duties set forth in Sched. A by the respective assessors, ... according to the number of windows therein, subject to the powers of discharging the same as after mentioned. Sched. A relates to the window tax, and not to inhabited house duty. Sect. 10 then proceeds: "And every dwelling-house, cottage, or tenement, and other the premises therewith occupied, and hereby charged as set forth in Sched. B, being together of the annual rent of 5*l.* or upwards, shall also be brought into charge

1904

SMITH v. DAUNEY.

Channell J.

in like manner, according to the full and just yearly rent at which the same is really and bonâ fide worth to be let in respect of the duties set forth in the said Sched. B." The words "and other the premises therewith occupied and hereby charged" clearly relate to premises—such as certain outbuildings and the garden if it does not exceed one acre—referred to in another section, which are for the purposes of the charge to be included with the dwelling-house in the charge. Sect. 10 then goes on to make assessors subject to a penalty if they omit to charge, "whether the occupier of any such house, cottage, or tenement shall be entitled to be discharged from the same in manner hereinafter mentioned, or not." Sect. 15 corresponds with s. 10, but relates to houses which are unoccupied at the time of making the assessment. It provides that every house or tenement which shall happen to be unoccupied at the time of making the assessment shall be inserted as such in the assessment, with the number of windows contained therein, and the annual rent at which the same might be let, "if the same shall amount to 5*l.* or upwards," and the assessors shall cause the same to be certified to the Commissioners, "from the time of such house or tenement coming into the occupation of any person or persons." So that if the house is occupied at the time of making the assessment, it is to be charged subject to the right of the occupier to be discharged if any of the provisions of the statute enable him to be discharged. I think, therefore, that at the time of making the assessment the assessor would have to bring the house in question here into the assessment, and that he would not have to inquire whether it was slept in the night before, or was going to be slept in that night, or to make any inquiry of that sort. It is occupied; it is habitable; it is a dwelling-house; it is ready for occupation as a dwelling-house and not for some other purpose. If there were no bedroom furniture in it, but only furniture appropriate to a class-room, or a gymnasium, or the like, it would come under a different category as not being, apart from the word "inhabited," a dwelling-house at all; but in the condition in which this house is it is "occupied," although not "inhabited" as a dwelling-house, because it has the full furniture of a dwelling-house in it, and is "occupied"

in the sense of occupation for rating purposes. I am of opinion, therefore, that it must come into charge. I think that if the first operative words of s. 1 of 14 & 15 Vict. c. 36, which impose the tax, would not in the ordinary interpretation of the phrase "inhabited dwelling-house" cover the house in this case, it is brought in by the provisions of the Act of 1803, which direct that it shall be charged subject to such power as there is for the person charged to be discharged under the various sections of the Act. If that be the true interpretation, it is, I think, quite clear that there is no section under which the respondent could get discharged on the ground that neither he nor anybody else had slept in the house in the year in question. None of the sections with reference to dividing up the year into periods when the house is occupied and when it is unoccupied apply. It seems to me, therefore, that the result is practically what the Scottish judges said it was in *Corporation of Glasgow* v. *Inland Revenue* (1), namely, that for the purposes of this statute a house is to be deemed to be an inhabited dwelling-house if there is in point of fact an occupier of it. If, as here, such occupation as there may be of the house is an occupation of it as a dwelling-house, as distinguished from the case dealt with by Wright J. of a class-room, or gymnasium, or a building of that kind—if the house is ready to be slept in when the owner or any one he sends wants to sleep in it, then I think it is "inhabited" within the meaning of the statutes. That seems to me the better interpretation. You have either to read "inhabited" in the section imposing the tax as meaning "occupied," or "occupied" in many of the other incorporated sections as meaning "inhabited." I have regard, also, to the analogy of rating, and I come to the conclusion on the whole that the tax is imposed upon houses in such a condition as was the respondent's in this case. My judgment, therefore, must be for the Crown.

Judgment for the Crown.

Solicitor for appellant: *The Solicitor of Inland Revenue.*
Solicitors for respondent: *Worthington Evans, Bird & Co.*

(1) 18 Sc. L. R. 1.

W. A.

1904
April 19.

THE UNDERGROUND ELECTRIC RAILWAYS COMPANY OF LONDON, LIMITED *v.* THE COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—Conveyance—Ad Valorem Duty—Consideration—Property conveyed subject contingently to the Payment of Money—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 57.

A company agreed to sell its undertaking to a new company in consideration of certain money and shares, and it was agreed that the profits of the new company in respect of each year should be applied, first, in the payment of 5 per cent. on the amount for the time being paid up on any shares for the time being issued by the new company; and, secondly, in paying to the original company, "as a further part of the consideration for the said sale, such a sum as shall be equal to a dividend of 3 per cent. for such year on the amount for the time being paid up on such of the original ordinary share capital in the new company as shall for the time being have been issued by the new company":—

Held, that this sum, though forming part of the consideration, was of so uncertain a character that it could not be assessed, and that the agreement was not chargeable with ad valorem duty in respect of it.

CASE stated by the Commissioners of Inland Revenue under s. 13 of the Stamp Act, 1891.

On July 8, 1902, an instrument was presented on behalf of the appellants, the Underground Electric Railways Company of London, Limited, to the Commissioners of Inland Revenue for their opinion as to the duty with which it was chargeable.

The instrument was an agreement entered into on June 25, 1902, between the Metropolitan District Electric Traction Company, Limited (thereinafter called the traction company), and the Underground Electric Railways Company of London, Limited (thereinafter called the new company).

The first clause of the agreement was as follows: "The traction company shall sell and transfer, and the new company shall purchase and take over as and from the 25th day of April, 1902, all and singular the undertaking, rights, and assets of the traction company whatsoever and wheresoever, subject to the respective liabilities and incumbrances to which the same respectively appear to be subject"

1904

UNDERGROUND ELECTRIC RAILWAYS COMPANY OF LONDON v. INLAND REVENUE COMMISSIONERS.

Clause 2: "Part of the consideration for the said sale shall be:—

"(*a*) The sum of 500,000*l.*, which (subject to the proviso contained in sub-clause (*b*) of this clause) shall be paid in cash by the new company to the traction company on the completion of the purchase, together with interest at the rate of 5*l.* per cent. per annum on 250,000*l.*, part of such sum calculated from the 25th day of March, 1902, up to the date of the passing of the final resolution for the winding-up of the traction company, but in any event for not more than one calendar month from the date hereof.

"(*b*) The sum of 500,000*l.*, which shall be satisfied by the issue to the traction company or its nominees of 100,000 ordinary shares of 10*l.* each in the new company, which shall for all purposes be deemed to be paid up to the extent of 5*l.* per share, and shall accordingly have the sum of 5*l.* per share credited as paid up thereon. Provided that the said sums of 500,000*l.* shall be reduced by such a sum as shall be equal to the difference between the amount actually paid up on each share of the traction company upon which 15*l.* has not been paid up or credited as paid up and the sum of 15*l.*; the reduction in respect of the non-payment of the last call of 5*l.* being made out of the cash, and the reduction in respect of the non-payment of previous calls being made out of the shares. . . ."

Clause 3: "The profits of the new company available for dividend in respect of each year shall be applied in the following order and manner, that is to say:—

"First. In payment of a cumulative dividend at the rate of 5 per cent. per annum up to the end of such year on the amount for the time being paid up on any shares for the time being issued by the new company; and

"Secondly. In paying to the traction company or its assigns as a further part of the consideration for the said sale such a sum as shall be equal to a dividend of 3 per cent. for such year on the amount for the time being paid up on such of the original ordinary share capital of 5,000,000*l.* in the new company as shall for the time being have been issued by the new company."

1904

UNDERGROUND ELECTRIC RAILWAYS COMPANY OF LONDON v. INLAND REVENUE COMMISSIONERS.

The Commissioners were of opinion that the sum contingently payable out of profits in each year under this sub-clause was, as therein expressed, "part of the consideration for the sale," and that, so far as such sum was capable of ascertainment at the date of the agreement, it was liable to ad valorem conveyance duty at the rate of 10*s.* per cent.

The railway company contended that such sum was incapable of ascertainment by reason of the remoteness of the contingency upon which the payment must be made.

At the date of the agreement the whole of the ordinary share capital of 5,000,000*l.* in the new company had been issued, namely, 500,000 shares of 10*l.* each, and on 100,000 of such shares 5*l.* per share had then been paid up, and on the remaining 400,000 shares 2*l.* per share had been paid up, such payments amounting together to 1,300,000*l.* Upon this sum of 1,300,000*l.*, 39,000*l.* is the sum which is equal to a dividend of 3*l.* per cent. for a year.

As the annual sum specified in the second sub-clause was in the opinion of the Commissioners contingently payable, according to the terms of the agreement, either in perpetuity or for an indefinite period within the meaning of s. 56, sub-s. 2, of the Stamp Act, 1891, the Commissioners were of opinion that the duty fell to be charged upon the said annual amount multiplied by 20 in accordance with the provisions of that section, and accordingly assessed together with other duty on the remaining part of the consideration a duty of 10*s.* per cent. upon 39,000*l.* multiplied by 20 = 780,000*l.* = 3900*l.* The railway company, on the other hand, contended that this was not a periodical payment within the meaning of this section.

The question for the opinion of the Court was whether the sum, or, if not, any and what part of such sum, was rightly included in the amount charged with duty, or, if not, whether any and what duty was assessable in respect of clause 3 (secondly) of the instrument.

Roskill, K.C. (*Austen-Cartmell* with him), for the appellants. The additional consideration given by paragraph 3, secondly, of the agreement is unascertainable and cannot form the ground

for an ad valorem duty. It contains two abiding elements of uncertainty, the first being the amount of share capital for the time being issued by the new company, and then, secondly, the question whether sufficient profits would be made to enable the company to pay a dividend of 3 per cent. over and above the 5 per cent. which, by the first clause of paragraph 3, they are bound first to pay. This cannot fall within s. 56 of the Stamp Act, 1891, although it is a periodical payment. That section only deals with definite and ascertained amounts of money payable periodically. The words in sub-s. 2 of s. 56, "will or may," refer to a definite sum payable for an indefinite period, and have no reference to money payable on a contingency. That is dealt with by s. 57 alone. That section contemplates the payment of money as being contingent, but it does not contemplate the contingency of the existence of the money itself. It deals with the payment on a contingency of a single definite sum, and does not apply at all to a case of periodical payments. The words in s. 57, "either certainly or contingently," were inserted to preclude the questions raised in *Mortimore* v. *Commissioners of Inland Revenue*. (1) All the cases on the section are cases where a definite sum was payable on a contingency: *Commissioners of Inland Revenue* v. *Liquidators of City of Glasgow Bank* (2); *Swayne* v. *Commissioners of Inland Revenue*. (3) [He also referred to *Sheffield Waterworks Co.* v. *Bennett* (4); *Furness Ry. Co.* v. *Commissioners of Inland Revenue*. (5)]

S. A. T. Rowlatt (*Sir E. Carson, S.-G.*, with him), for the respondents. The amount is neither unascertained nor unascertainable. It is found in the case that the whole of the ordinary share capital of the company had been issued, and that 1,300,000*l.* had been paid up. The Commissioners were, therefore, entitled to take 3 per cent. on that sum. Directly a sum is ascertained it is taxable, and the fact that its payment is contingent is immaterial. Sects. 56 and 57 are not mutually exclusive. There may be periodical payments depending on a

(1) (1864) 2 H. & C. 838.
(2) (1881) 8 R. 389.
(3) [1899] 1 Q. B. 335; [1900] 1 Q. B. 172.
(4) (1872) L. R. 7 Ex. 409.
(5) (1864) 33 L. J. (Ex.) 173.

1904

UNDERGROUND ELECTRIC RAILWAYS COMPANY OF LONDON v. INLAND REVENUE COMMISSIONERS.

contingency which are taxable. The mere fact that there may not be enough earned to enable the company to pay the 3 per cent. is immaterial so long as the amount which might be paid can be ascertained.

The Commissioners might have assessed the 3 per cent. on the whole amount of shares issued, as that would be the maximum that could be paid. They have, however, contented themselves with assessing it on the actual amount paid up at the date of the agreement. [He referred to *Canning* (*Lord*) v. *Raper* (1); *Onslow* v. *Commissioners of Inland Revenue*. (2)]

Roskill, K.C., replied.

CHANNELL J. In this case the sale by the old company to the new company of its undertaking was in consideration partly of certain definite sums about which no difficulty arises, and partly of such a sum as should be equal to a dividend of 3 per cent. in each year on the amount for the time being paid up on such of the original ordinary share capital of 5,000,000*l.* in the new company as should for the time being have been issued by the new company. That is set out secondly in clause 3 of the agreement. That seems to me to be a sum which is uncertain, and uncertain without any real basis of calculation. I think that there is here not a mere contingency, but that there is what has been called in some cases a double contingency. There is not only a contingency in respect of the amount of dividend which may be earned by the new company, but there is the further contingency introduced by the uncertainty as to what amount may be paid up for the time being; it is not merely an uncertainty as to the amount of the earnings of the company; but there is the further uncertainty as to the amount which may be issued and paid up. That uncertainty as to the amount of share capital issued by the new company and the amount paid up on the shares so issued comes in twice; because, before anything is payable under the second clause of paragraph 3 of the agreement, a dividend of 5 per cent. per annum upon the same uncertain amount has to be paid to the shareholders of the new company under the first

(1) (1852) 1 E. & B. 164. (2) [1891] 1 Q. B. 239.

clause. Therefore, out of the earnings of the company (which, of course, are themselves uncertain) there must first be deducted an amount which will vary from time to time. That uncertain amount has first to come out of the earnings of the company; and then comes the further uncertainty whether the amount of the earnings will be enough to pay anything between 5 per cent. and 8 per cent.—that is to say, the extra 3 per cent., or any part of it mentioned in the second clause of the paragraph. In that again there is not only the uncertainty arising from the amount of the earnings, but also the uncertainty arising from the amount paid up for the time being on the share capital for the time being issued by the new company; so that there are two items of uncertainty. It seems to me that this sum, which the new company agree to pay to the old, is an absolutely uncertain sum and incapable of being calculated. It seems to me further that it cannot be brought within the cases, where there is an uncertain amount with a maximum which is fixed. Where that is the case I am inclined to think, though it is not necessary for me now to decide the point, that the conveyance might be said to be subject contingently to the payment of money within the meaning of s. 57. I also think that it would be possible to make the payment of the money in periodical instalments of ascertained sums, and that by the joint operation of s. 56 and s. 57 the conveyance might be chargeable with an ad valorem stamp duty, although the consideration might consist of money payable periodically under s. 56, and although the property were conveyed subject contingently to the payment of money under s. 57. I think that the two sections may be applied in this way. But here it seems to me there is a double contingency. I do not myself see any foundation for suggesting that the share capital paid up at the date of the deed can be taken as the basis for calculating the consideration. There is no doubt about it that it is not the real consideration, unless indeed the whole capital which they could issue had then all been issued and all paid up; but that is not, in point of fact, the case here. The amount that happens to have been paid up at that particular time is an accident, and it is not the real basis on which the consideration can be calculated. I can

1904

UNDERGROUND ELECTRIC RAILWAYS COMPANY OF LONDON v. INLAND REVENUE COMMISSIONERS.

Channell J.

see no justification for saying that at any rate so much has in fact been paid up, and that 3 per cent. upon that amount represents a definite maximum amount, and that the only contingency is that the company should earn 8 per cent. per annum upon the amount which has in fact been paid up. It was admitted during the argument that, in the case of a sale of a business in consideration of an agreement to pay a share of the profits which might be made in that business hereafter, the amount of the consideration was so uncertain that an ad valorem duty could not be charged. When once that is admitted it seems to follow that this present case cannot be so dealt with.

I come to the conclusion, therefore, that this is a sum added to and taken as part of the consideration, but of so uncertain a character and with no data from which it can be ascertained, that it is impossible to bring it in for the purposes of ad valorem duty, and although it, no doubt, constitutes a substantial consideration, yet the result seems to be, from the form it takes, that so far as stamp duty is concerned the deed would have to be stamped simply with a 10*s*. stamp as a deed. Of course that is not the stamp here, because there is other substantial consideration on which ad valorem duty has been paid.

On the whole, I think I must give judgment in this case for the appellants.

Appeal allowed.

Solicitors for appellants : *Bircham & Co.*

Solicitor for respondents : *The Solicitor of Inland Revenue.*

A. P. P. K.

FIRTH & SONS, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

1904
April 19.

Revenue—Stamp—"Receipt"—"Discharge"—Debenture Stock—Acknowledgment that Debenture Stock has been redeemed, paid off, and satisfied—Stamp Act, 1891 (54 & 55 *Vict.* c. 39).

On an indenture securing redeemable debenture stock an instrument was indorsed, which was signed by the trustees for the debenture-holders, acknowledging that all the debenture stock secured by the within written indenture and all interest thereon had been redeemed, paid off, and satisfied:—

Held, that this was not a "discharge" within the meaning of that term in sub-heading 5 of the heading "Mortgage" in the schedule to the Stamp Act, 1891, and that it was therefore not chargeable with ad valorem duty, but that it was merely a receipt, and being indorsed on a duly stamped instrument it was exempt from duty under the eleventh exemption to the heading "Receipt" in the same schedule.

CASE stated by the Commissioners of Inland Revenue under s. 13 of the Stamp Act, 1891 (54 & 55 Vict. c. 39).

On July 31, 1903, an instrument was presented on behalf of the appellants, Messrs. Thomas Firth & Sons, Limited, a company registered under the Companies Acts, to the Commissioners of Inland Revenue for their opinion as to the stamp duty with which it was chargeable.

The instrument was in the following terms:—

"Whereas the within named C. H. Firth died on December 1, 1892, the within named B. P. Broomhead died on December 15, 1893, and the within named J. H. Barber died on December 25, 1902, we the within named E. Firth, J. B. Firth, and S. Roberts do hereby acknowledge that all the debenture stock secured by the within written indenture and all interest thereon has been redeemed, paid off, and satisfied. As witness our hands this 30th day of June, 1903.

"E. Firth.
"J. B. Firth.
"S. Roberts."

This instrument was indorsed on an indenture dated

1904

FIRTH & SONS, LIMITED v. INLAND REVENUE COMMISSIONERS.

December 23, 1881, which was made between Thomas Firth & Sons, Limited, of the one part, and E. Firth, C. H. Firth, J. B. Firth, J. H. Barber, B. P. Broomhead, and S. Roberts, as trustees for debenture-holders, of the other part, and which in effect created redeemable debenture stock amounting to 100,000*l.* in accordance with the conditions contained in the schedule. The schedule provided that the said stock or any part thereof might at the option of the company be redeemed and paid off at par at any time prior to the winding-up of the company.

The said debenture stock was redeemed and paid off in pursuance of the provisions of the said indenture, and upon payment off, the instrument in question was indorsed on the indenture.

The Commissioners being of opinion that the instrument was chargeable, by reference to sub-heading 5 of the heading "Mortgage" in the 1st schedule to the Stamp Act, 1891, as a discharge of a security by way of mortgage or of the money thereby secured, assessed the instrument as liable to the duty of 6*d.* per cent. on 100,000*l.* secured by the indenture, but at the request of the appellants stated this case for the opinion of the Court.

Danckwerts, K.C., and *John Dixon*, for the appellants. The only question is whether this instrument is a "discharge" within the meaning of that term as used in the schedule to the Stamp Act, 1891. The distinction between a release and a receipt was drawn by Martin B. in *Bowes* v. *Foster* (1): "A release annihilates the debt, but a receipt is only evidence of payment." This instrument was a receipt, and as it was indorsed on an instrument duly stamped it comes within the eleventh exemption to the heading "Receipt" in the Stamp Act, 1891. The indenture only created a floating security as defined in *Government Stock and other Securities Investment Co.* v. *Manila Ry. Co.* (2); and the instrument in question does not purport to discharge the security, but is merely an acknowledgment that it has been paid off.

(1) (1858) 2 H. & N. 779, at p. 788.

(2) [1897] A. C. 81.

[They referred to *Attorney-General* v. *Carlton Bank* (1); Davidson's Precedents, 1881 ed. vol. ii., pt. 2, p. 302.]

S. A. T. Rowlatt (*Sir E. Carson, S.-G.*, with him), for the respondents. No doubt a mere receipt is not liable to ad valorem duty, but this instrument is more than a receipt. It says that the debenture stock secured by the indenture has been redeemed, paid off, and satisfied. It is a statement by those entitled to enforce the security that the security is at an end, and is therefore a protection to the persons to whom it is given against the enforcement of the security against them. That amounts to a release of a mortgage, and comes within sub-heading 5 of the heading "Mortgage" in the schedule to the Act.

Danckwerts, K.C., replied.

CHANNELL J. I think when this matter comes to be understood it is really quite clear. The instruments that come under sub-headings headed "Mortgage" are all cases of operative instruments. To begin with, there are "Mortgages, Bonds, Debentures, and Covenants," all of which create either some security or obligation, or whatever it may be. Then come "Transfers, Assignments, and Dispositions," which again are all operative instruments. Then comes sub-heading 5—"Reconveyance, Release, Discharge, Surrender, Resurrender, Warrant to Vacate, or Renunciation." The last two of these are Scotch terms and need not be considered now. All the others except "Discharge" clearly are intended to describe instruments which have an operation in putting an end to some existing security. They are, as stated in the sub-heading, reconveyances, releases, &c., of "any such security as aforesaid, or of the benefit thereof, or of the money thereby secured." They all operate to put an end to obligations already in existence and created by the instruments described under the preceding sub-headings.

The document in question, I think, has not any force as an instrument putting an end either to any obligation or to any security. It is merely evidence that the obligation or security

(1) [1899] 2 Q. B. 158.

1904

FIRTH & SONS, LIMITED v. INLAND REVENUE COMMISSIONERS.

Channell J.

no longer is in effective existence, and it comes, therefore, quite clearly under the heading "Receipt." No doubt a document may be both a receipt and a discharge; but I think that what is aimed at by sub-heading 5 of the heading "Mortgage" is, as I have said, instruments which have some operation in putting an end to an obligation, I construe the word "discharge" in reference to the other documents with which it is associated, and I think, therefore, that it means, not a document which is evidence of a previous discharge, but a document which in itself actually discharges the obligation. That being so, I think that this document does not come within the term "discharge" in the schedule, and that it can only be stamped as a receipt. In the particular case, however, it is indorsed on an instrument already duly stamped, and, therefore, does not require to be stamped at all.

Appeal allowed.

Solicitors for appellants: *Johnson, Weatherall & Sturt, for Broomhead, Wightman & Moore, Sheffield.*

Solicitor for respondents: *The Solicitor of Inland Revenue.*

A. P. P. K.

1904

April 26.

RIGBY & CO. *v.* COX (No. 2).

Practice—Costs—Workmen's Compensation—Review of Amount fixed by Award or Agreement—Interlocutory or Original Proceeding—Discretion of County Court Judge—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., clause* 12.

A county court judge has no jurisdiction to give a general direction to the registrar that the costs of all applications under clause 12 of Sched. I. of the Workmen's Compensation Act, 1897, to vary the amount of compensation fixed by award or agreement shall be treated as though the application were a mere interlocutory application in the matter of the arbitration, and not an original arbitration or proceeding.

APPEAL from a decision of the judge of the Bromley County Court refusing to direct a review of the taxation of the costs of

an application for review of a weekly payment under the Workmen's Compensation Act, 1897.

Cox, a workman in the employment of Rigby & Co., having sustained injury by an accident arising out of and in the course of his employment, the amount of weekly compensation to be paid to him was ascertained by agreement between himself and his employers, and a memorandum of the agreement was sent to the registrar of the county court as prescribed by Sched. II., clause 8, of the Workmen's Compensation Act, 1897, and was duly registered by him. Some months afterwards the employers applied to the county court judge under Sched. I., clause 12, of the Act for a review of the weekly payment on the ground that the workman was fit to go to work. The judge dismissed this application with costs upon Scale B of the county court scales of costs, and in due course the costs of the workman were carried in for taxation. Upon taxation it appeared that the county court judge had made a general rule or order that the costs of an application under Sched. I., clause 12, to review a weekly payment were to be taxed as costs of an interlocutory application, the effect of which was very materially to diminish the amount of the taxed costs. An application was then made by the workman to the county court judge for a review of the taxation; but the judge, without hearing argument, handed the following statement to counsel: "On an application to review registrar's taxation his Honour held that costs of an application to vary an award or to vary an agreement registered under s. 8 of Sched. II. shall be taxed as a mere application in the matter of the arbitration, and not as an original arbitration or proceeding." The workman appealed to the Court of Appeal; but, it being held that the appeal would not lie to the Court of Appeal under Sched. II., clause 4, of the Workmen's Compensation Act, 1897—see *Rigby & Co.* v. *Cox* (*No.* 1) (1)—the appeal was now brought in the Divisional Court.

Chester Jones and *Harold Morris*, for the workman. The county court judge had no power to make a general rule as to

(1) [1904] 1 K. B. 358.

1904

RIGBY & Co. v. COX (No. 2).

the costs of all applications to review. He is bound to consider the facts of each case, and to say whether the application is to be treated as original or interlocutory. Clause 12 of Sched. I. to the Act provides that on such applications the amount may be settled by arbitration. That would be an original arbitration, and by rule 33 of the Workmen's Compensation Rules, 1898, in default of any direction by the judge the costs would be taxed as though the proceeding had been an action in the county court. When the matter was before the Court of Appeal both Mathew and Cozens-Hardy L.JJ. expressed the opinion that such a rule ought not to be laid down by a county court judge. (1)

Duckworth, for the employers. By clause 6 of Sched. II. to the Act the arbitrator (that is to say, the county court judge) has an absolute discretion over the costs. When the amount of compensation has been fixed by an award or by agreement, all subsequent applications to vary the amount must be treated as interlocutory. It cannot be disputed that the county court judge might give directions in each case that the application was to be treated for the purposes of taxation as interlocutory. He had, therefore, power to make a general rule to the same effect.

In the Court of Appeal the matter was not argued, and the observations of the learned Lords Justices are obiter.

Harold Morris replied.

LORD ALVERSTONE C.J. I think that neither the schedule nor the rules were intended to lay down any hard and fast rule to govern this case, namely, that an application to review an amount of compensation fixed by an award or an agreement must in every case be either interlocutory or an original action.

By clause 12 of the 1st schedule to the Act any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum provided in the Act, and the amount of payment shall in default of agreement be settled by arbitration under the Act.

(1) [1904] 1 K. B. at p. 361.

By rule 33, "Any costs of and incident to an arbitration and the proceedings connected therewith directed by the judge to be paid by one party to another shall be taxed according to such one of the scales of costs applicable to actions in the county court as the judge shall direct, and in default of such direction shall be taxed according to the scale which would be applicable if the proceeding had been an action in the county court."

I think it is quite consistent with those directions that there might be an application in the county court to review an amount which might be interlocutory, or, on the other hand, which might amount to proceedings in an action. It must be observed that by clause 6 of Sched. II. to the Act the costs of and incident to the arbitration and proceedings shall be in the discretion of the arbitrator. There is nothing either in the schedules or in the rules to say that such an application as the one in question must be always either interlocutory or in the nature of an original action.

In my opinion such applications may, according to the particular circumstances of each case, be treated under either head. If in this case the judge had said that he had considered the question and had come to the conclusion that this application was to be treated as interlocutory for the purposes of taxation, I should not have attempted to interfere with his discretion; but as I understand it, he did not act on any consideration of the nature of the case. He made an order dismissing the employers' application to review the amount, with costs to be taxed on Scale B. That does not dispose of the matter, because Scale B contains costs which are different according as the matter in respect of which the costs are to be taxed is interlocutory or on an original plaint. His subsequent direction, therefore, was not such a varying of his order as we have held that county court judges have no power to make. (1)

But the registrar in taxing the costs acted on the standing direction of the judge that all such applications should be treated as interlocutory; and the judge, on an application to review the registrar's taxation, refused to hear any argument,

(1) See *Robinson* v. *Fawcett & Firth*, [1901] 2 K. B. 325.

1904

RIGBY & Co. v. COX (No. 2.)

Lord Alverstone C.J.

and announced that he had held that the costs of an application to vary an award or an agreement were to be taxed as on a mere application in the matter of the arbitration, and not as on an original proceeding. Speaking for myself, and apart from the important observations on the point of Mathew and Cozens-Hardy L.JJ. when this case was before the Court of Appeal, I do not think that a county court judge ought to fetter his discretion by making any such general rule as this, and by giving a direction to the registrar which he was to act upon whatever the case might be. I think it is quite open to the county court judge to say in each case whether the application is interlocutory or original for the purposes of taxation, and to direct the costs to be taxed accordingly.

I think he has not exercised his discretion here, and that the case must go back to him in order that he may do so, and may say on the circumstances of the case whether the application ought to be treated as interlocutory or not.

WILLS J. I am of the same opinion. I should be sorry to say a word which would in any way interfere with the discretion given to the learned judge by clause 6 of Sched. II. If he came to the conclusion on any individual case that the application was to be treated as interlocutory and directed the costs to be taxed accordingly, no one could impeach his decision. But he has not done so. He has issued a general direction that all such applications are to be treated as interlocutory for the purposes of taxation, and having made this rule he has felt bound to follow it himself, and so has deprived himself of the power of exercising the discretion as to costs given him by the Act.

KENNEDY J. I agree.

Appeal allowed.

Solicitors for employers: *William Hurd & Co.*

Solicitors for workman: *Shaen, Roscoe & Co., for Morgan & Co., Newport, Mon.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1904
May 3.

JAMES *v.* OCEAN COAL COMPANY, LIMITED.

Employer and Workman—Workmen's Compensation—Average Weekly Earnings—Fall in Wages since Accident—Review of Weekly Payment—Partial Incapacity—Discretion of County Court Judge—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., sub-ss.* 1 (*b*), 2, 12.

A workman employed as a haulier at a colliery was, by an accident arising out of and in the course of his employment, totally incapacitated for work. Compensation was, by arrangement, paid him by his employers at the maximum rate under the Workmen's Compensation Act, 1897, namely, 17*s.* per week, that being 50 per cent. of 1*l.* 14*s.*, the amount of his average weekly earnings before the accident. He subsequently so far recovered from the effects of the accident as to be capable of light work, and his employers took him back into their service as a lampman at wages of 1*l.* 9*s.* 5*d.* per week, and ceased to pay him compensation. At that time the rate of wages paid to hauliers in the colliery had fallen to 1*l.* 9*s.* 5*d.* per week. The workman having filed a request for arbitration in the county court to assess compensation under the Act, the county court judge refused to award him compensation, giving reasons for so doing which indicated that he might have acted on the view that the amount of the average weekly earnings to be taken as the basis for determining the amount of compensation was subject to variation in accordance with the fluctuations in the rate of wages in the employment subsequent to the accident:—

Held, that the amount of the workman's average weekly earnings as originally ascertained for the purpose of fixing the maximum compensation was not subject to variation by reason of the fall in the rate of wages paid to hauliers since the accident; and that it was a matter for the discretion of the county court judge whether he would award to the workman any substantial, and, if so, what proportion of the difference between the amount of his average weekly earnings before, and the average amount which he was able to earn after the accident: and the case must therefore be remitted to the county court judge for reconsideration.

APPEAL against the award of the judge of the Glamorganshire County Court upon a claim for compensation by a workman under the Workmen's Compensation Act, 1897.

The workman had been employed by a colliery company as a haulier, and, while so employed, was on October 9, 1901, injured through an accident arising out of, and in the course of his employment, so as to be totally incapacitated for work.

C. A. 1904

JAMES v. OCEAN COAL COMPANY.

His average weekly earnings during the twelve months previous to the accident were 1*l.* 14*s.* The company paid him compensation at the rate of 17*s.* per week from a fortnight after the date of the accident till June 15, 1903, when, having to some extent recovered from the effects of the accident, he was again employed by the company in light work as a lampman at wages of 1*l.* 9*s.* 5*d.* per week. The company then ceased to pay him compensation. He thereupon filed a request for arbitration under the Workmen's Compensation Act, 1897, to assess the amount of compensation payable to him, claiming payment of the weekly difference between the wages earned by him previously to the accident and those which had or might be earned by him since June 15, 1903, and a declaration of the company's liability. The medical evidence shewed that, though the workman had so far recovered from the effects of the accident as to be able to do light work, he would never be able to do heavy work again. It appeared that the wages of hauliers employed in the colliery fluctuated from time to time under an arrangement by which percentages regulated by the price of coal for the time being were added to a standard rate of wages fixed at some antecedent date. In the interval between the date of the accident and June 15, 1903, the rate of wages paid to hauliers had dropped by reason of a drop in the percentages, so that 1*l.* 9*s.* 5*d.* represented the average weekly wages of a haulier at the later date. The contention for the workman was that the compensation payable to him ought not to be affected by the fluctuations in the rate of wages paid to hauliers, and that he was entitled to a weekly payment of 4*s.* 7*d.*, being the difference between the average weekly wages he was earning before the accident and the wages he was earning in his present employment, or a portion of that sum.

In giving judgment the county court judge said: "The principal question, therefore, for decision in this case is whether, when the amount of compensation has been decided, either by award or agreement, on the basis of the earnings of the injured person prior to the accident, by which for a time he was totally incapacitated from working, that compensation is subject to revision when he is able to undertake light employ-

ment, and whether it is subject to the variations governing the wages paid to persons doing similar work to that which he performed prior to the accident. I am of opinion that the proper principle to be adopted in such circumstances is that the basis—i.e., the wages on which the amount of compensation was originally fixed—should be varied to the extent of the variation of the percentages in the wages earned by persons performing similar work at the time, but that the wages earned by the injured person when he undertook light employment should be supplemented by a sum which would bring up his earnings to the same amount as is paid to persons in similar employment to that in which he was engaged prior to the accident The effect of my decision is to place the injured person in the same position with regard to earnings as he would have been in if he had not been injured, for, if he had continued to work without interruption, his wages would have been subject to the variations in the percentages, and would therefore in this case be less than those which he earned prior to the accident. On the other hand, if the applicant's contention is to be allowed—namely, that the wages earned by him in undertaking light employment are to be supplemented by a sum which would bring them up to those which he earned prior to the accident—he would be receiving higher wages than those who were at that time engaged in a similar capacity. That, in my opinion, would be absurd. In arriving at these conclusions I have not lost sight of the fact that he is as a consequence of the injuries he received still unable to undertake the duties which he performed prior to the accident, or indeed any heavy work. In applying the principle which I have laid down as affecting the variations in the percentages, I find that the respondents have since June 15 paid the applicant the proper amount of compensation, for he has received the same rate of wages as those hauliers who performed the same duties as he did prior to the accident, their wages having by the drop in the percentages been reduced to the same amount as he has been paid; he therefore fails in his application to review the amount of compensation paid to him. I therefore award to the applicant compensation at the same rate as he has received

C. A. 1904

JAMES v. OCEAN COAL COMPANY.

since June 15, and, as he is still suffering from the effects of the accident, and unable to resume his former occupation, there will be a declaration of liability."

Abel Thomas, K.C., and *Rhys Williams* (*J. Sankey* with them), for the workman. The county court judge acted on the view that the amount of the compensation was subject to variation in accordance with the variation of the rate of wages in the employment in which the workman had been engaged prior to the accident, and that, as a matter of law, if the workman was earning subsequently to the accident the same rate of wages as he would have done in that employment, if the accident had not occurred, no compensation could be awarded to him. It is submitted that this view was clearly erroneous. The maximum rate of compensation is by the terms of sub-s. 1 (*b*) of the First Schedule to the Workmen's Compensation Act, 1897, to be ascertained by reference to the average weekly earnings of the workman during the period mentioned in the Act prior to the accident; and the maximum so ascertained cannot be affected by any subsequent fluctuations in the rate of wages. When a workman, who was totally incapacitated by an accident, becomes only partially incapacitated, no doubt the county court judge has a discretion to review the compensation on consideration of the difference of wages referred to in sub-s. 2 of the First Schedule and the other circumstances of the particular case. But the county court judge in the present case appears not to have exercised any discretion, but to have acted solely on the view that as a matter of law the fall in the rate of wages after the sum of 17*s.* per week had been arrived at, and the fact that the man was earning the same wages as he would have earned on the current scale of wages, if no accident had happened, left him no option but to refuse to award any substantial compensation. In the case of *Jamieson* v. *Fife Coal Co.* (1) it was held by the Court of Session in Scotland that this view was erroneous. If the compensation were affected by the subsequent fluctuations of the rate of wages, it would be constantly

(1) (1903) 5 F. 958.

varying, and this would lead to incessant litigation. It is submitted that the county court judge ought to have awarded to the workman the whole or some proportion of the difference between 1*l.* 14*s.*, the weekly wages he was earning before the accident, and 1*l.* 9*s.* 5*d.*, the weekly wages which he was receiving at the time of the hearing.

Ruegg, K.C., and *A. Parsons*, for the employers. The county court judge was not bound to award any substantial compensation under the circumstances of the case. If he awarded any compensation, the workman would be making a profit out of the accident, because he would be getting more than he would have earned, if the accident had never happened. Such a result was never intended by the Legislature. The matter was entirely one for the discretion of the judge. The judge may under sub-s. 2 put an end to the compensation altogether, if he thinks fit. Assuming that some passages in the judgment of the county court judge may not, taken alone, be an altogether accurate statement of the law, it is submitted that, taking the whole of what he said together, it appears that he exercised his discretion in the matter. The Court ought not to send the case back to him, if they think that in the result he did not arrive at a wrong conclusion under the circumstances of the case. The case of *Jamieson* v. *Fife Coal Co.* (1) does not touch the present case. There had been no change whatever in the circumstances in that case except that the rate of wages had fallen. It was not, as in the present case, a question of reviewing the compensation on the ground that the workman had recovered so as to be able to do light work.

COLLINS M.R. This is an appeal from an award made by a county court judge on an application by a workman, not, I think, strictly speaking, for a review of the compensation, though substantially it comes to the same thing, but to have the amount of the compensation payable to him determined. The circumstances of the case are as follows. The workman, who was employed as a haulier in a colliery, met with an accident,

(1) 5 F. 958.

C. A. 1904

JAMES v. OCEAN COAL COMPANY.

Collins M.R.

which for the time resulted in his total incapacity for work. He had apparently been earning before the accident 1*l.* 14*s.* a week. That amount must, I think, be taken to have been ascertained as the average of his weekly earnings prior to the accident during the period mentioned in the statute; and, in arriving at such an average, the fluctuations of wages during that period would necessarily have been taken into account. The parties appear to have arrived at this amount for themselves without the intervention of the county court judge, and compensation was accordingly paid to the workman by the employers and received by him for a considerable time at the rate of 17*s.* a week, being the maximum of 50 per cent. of his average weekly wages taken at 1*l.* 14*s.* per week. Afterwards the workman recovered sufficiently to undertake light work, and the company on June 15, 1903, took him back into their employment as a lampman, and were paying him wages of 1*l.* 9*s.* 5*d.* per week. That amount happened to be the same as was at that time being paid as weekly wages to persons employed by the company as hauliers, that being the employment in which the workman was engaged at the time of the accident. Under these circumstances the employers refused to continue paying compensation in addition to the sum which they were paying as wages to the workman, and denied liability to pay any more than they were paying. The workman, being dissatisfied, applied to the county court judge to have the sum payable to him as compensation determined. In the result the county court judge decided that the employers' contention that the workman was not entitled to any further sum by way of compensation, in addition to what he was receiving, was correct; and therefore he did what he no doubt intended to be equivalent to awarding the workman a merely nominal amount, so as to preserve seisin of the case, but gave him no substantial sum, his view being that what the workman was receiving under the existing arrangement was sufficient. If the learned county court judge had simply stated that in his view there was no reason for interfering with the arrangement under which the workman was receiving 1*l.* 9*s.* 5*d.* per week, and had not entered into a

discussion of his reasons, and the principles on which compensation was to be determined, there would have been no ground upon which we could have interfered with his decision. We have no jurisdiction to review the exercise by the county court judge of his discretion on a mere question of amount, and there would in that case have been no reason to suppose that he had gone wrong in arriving at the conclusion to which he came. The difficulty in the present case arises from the fact that the judge has stated his reasons; and has, after an argument before him raising, as we are told, an important question of principle which both parties wished to have decided, travelled into a discussion of principles, and laid down rules with which I am not prepared to agree. He appears to me to have laid down a hard and fast rule as to the assessment of compensation which I am unable to adopt. I will read the paragraphs of his judgment in which he formulated two questions for his own consideration in deciding the case. He said: "The principal question, therefore, for decision in this case is whether, when the amount of compensation has been decided, either by award or agreement, on the basis of the earnings of the injured person prior to the accident, by which for a time he was totally incapacitated from working, that compensation is subject to revision when he is able to undertake light employment." So far, what he says is quite correct. It is clear that under the circumstances the compensation was subject to revision, because by sub-s. 2 of the First Schedule to the Act, "in fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment not being wages which he may receive from the employer in respect of his injury during the period of his incapacity"; and by sub-s. 12 of the same schedule, "any weekly payment may be reviewed at the request either of the employer, or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act." Therefore

C. A. 1904

JAMES v. OCEAN COAL COMPANY.

Collins M.R.

the first question admitted but of one answer, namely, that the amount of compensation was subject to revision. Then the county court judge proceeded to formulate a second question for his own consideration, which, when analyzed, appears to me to involve a misconception of the law; and, if that misconception may be supposed to have formed a factor in arriving at the conclusion to which he came, it would be an element which we should not, I think, be justified in ignoring, and treating as irrelevant to his decision; and therefore it would be necessary to send the case back to him for reconsideration. The second question is this: "and whether it," that is the compensation, which, ex hypothesi, was the maximum allowable in case of total incapacity for work, "is subject to the variations governing the wages paid to persons doing similar work to that which he performed prior to the accident." I think that, on analyzing the actual words used by the county court judge, the second question which he so submitted to himself must mean, whether the sum so awarded on the basis of total incapacity is subject to variation in accordance with subsequent variations of the rate of wages. The county court judge proceeded as follows: "I am of opinion that the proper principle to be adopted in such circumstances is that the basis, i.e., the wages on which the amount of compensation was originally fixed, should be varied to the extent of the variation of the percentages in the wages earned by persons performing similar work at the time, but that the wages earned by the injured person when he undertook light employment should be supplemented by a sum which would bring up his earnings to the same amount as is paid to persons in similar employment to that in which he was engaged prior to the accident." What the judge there says seems to me to carry out what appears primâ facie to be the meaning of the second question, namely, that the maximum originally fixed on the average amount of wages is subsequently to be varied in conformity with the variations of the percentages in the wages earned by persons performing similar work at the time. So far as the learned county court judge has committed himself to that view, I think that he was wrong; for I think that the maximum fixed in the first instance is entirely

independent of subsequent fluctuations of wages. That seems to be the effect of the decision in *Jamieson* v. *Fife Coal Co.* (1) and the scheme of the Act. When the maximum has been arrived at in the first instance, it is not subject to alteration by anything that takes place subsequently. If it were subject to alteration, the effect would be to introduce a fluctuating maximum, which seems quite contrary to the terms of the Act. I am confirmed in thinking that the meaning of the judge must have been as I suggest by what he says as to supplementing the wages earned by light employment, which seems clearly to involve that he was dealing with the case on the basis of a fluctuating maximum. I do not say that, in the exercise of his discretion in a particular case, it would be wrong for a county court judge to supplement the wages earned by the workman in the light employment by such proportion of the maximum as would bring the total up to the amount of the wages earned by persons engaged in the same employment as that in which the injured man was engaged prior to the accident. But it is not competent for him to lay down a general principle that would oblige him to arrive at the same result in different cases. We have repeatedly held that the county court judge must not lay down rigid canons, obliging him to arrive at the same conclusion in all cases, but must exercise his discretion with reference to the circumstances of the particular case. So far as he may be considered to have laid down a general rule of arithmetic on the subject, and, so far as that rule involves the proposition that the original maximum is subject to fluctuations, I think he was wrong. I am not sure whether that error really entered into his calculations in arriving at his decision; but if, and in so far as it did, I think his decision ought to be reviewed. On the Act itself the matter appears to be perfectly clear. When a workman has, by an accident coming within the Act, been totally incapacitated for work, the county court judge, in assessing compensation, has to ascertain the amount of the average weekly earnings of the injured man in his employment during such period prior to the accident as is mentioned in the Act, and he cannot award

(1) 5 F. 958.

C. A. 1904

JAMES v. OCEAN COAL COMPANY.

Collins M.R.

as compensation more than 50 per cent. of the amount so ascertained. When that amount has been once ascertained, that matter is done with, and cannot be reopened. But the Act provides that the weekly payment may be reviewed, and, on such review, may be ended, diminished, or increased, subject to the maximum; and by sub-s. 2 of the First Schedule it is provided that, in fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident. So that, upon a review, in a case like this, a new factor is introduced, and the county court judge then has to consider what payment under all the circumstances of the case he ought to award to the workman by way of indemnity under the Act, which appears, primâ facie, not to contemplate that the workman shall receive a complete indemnity against the consequences of the accident. Any element of fluctuation in the original maximum is quite irrelevant to the discussion. In such a case what the county court judge has to consider, is whether and to what extent, having regard to the considerations indicated in sub-s. 2 of the First Schedule, it may be proper to reduce the compensation below the maximum by reason of the incapacity for work, which was originally total, having become only partial. That is left entirely to his discretion, subject to the rule that, as I have said, he is to have regard to the difference between the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, a matter which does not embrace the consideration that the county court judge has introduced here, namely, the question whether the maximum originally awarded is subject to fluctuation. The county court judge having in his judgment expressed an opinion as to the law which appears to me to be incorrect, it is impossible to say for certain how far that opinion may have affected the conclusion at which he arrived, and therefore, as it seems to me, we have no alternative but to send the case back to him for reconsideration. It may be that I have not entirely understood him, and the element to which I have alluded may not have affected the result at which

he arrived; and, when the case comes before him again, the result may be that he may make no alteration in his decision; but I cannot feel sure that he would have arrived at the same conclusion, apart from the view which he has expressed. This view appears to have been pressed upon him in argument, and his decision may have been influenced by it. Another difficulty arises on the form of the judgment, for the county court judge awards to the applicant compensation at the same rate as he has received since June 15. He no doubt intended to produce the same result as if he had awarded a nominal sum, but in point of form his judgment in that respect seems to me to be wrong.

ROMER L.J. The Master of the Rolls and my brother Mathew are both of opinion that there has been a misdirection of himself by the county court judge, and consequently he may or may not have properly exercised his discretion in this matter; and I am not prepared to differ from them, for I think there are passages in the judge's judgment which are not accurate statements of the law. The case must therefore be referred back to him. I must say, however, that I regret this result; for I cannot think that the conclusion arrived at by the county court judge was in itself improper. I say this, because, in the circumstances of the case, it appears to me clear that it would be proper for the judge, in reviewing the weekly payment, to consider the fact that the workman was being employed by his former employers at wages far exceeding the maximum compensation which could be awarded to him in case of total incapacity, and which equalled the wages he could have earned if the accident had not happened to him. Under these circumstances I cannot see that the judge was wrong in refusing to order the employers to pay any further sum by way of compensation, as long as they continued to pay the workman the same rate of wages. I cannot help thinking that the only result of sending this case back to the county court judge may be that he will, in the exercise of his discretion, arrive at the same conclusion, and that further costs will be incurred in vain. However, as the point has

C. A. 1904

JAMES v. OCEAN COAL COMPANY.

been taken for the appellant, and insisted on, I agree that we have no alternative but to send the case back to the county court judge for reconsideration.

MATHEW L.J. I am of the same opinion. The question argued in this appeal was whether the county court judge held that he was bound, in dealing with the question of compensation, to look at the wages which the workman was at the time earning, and, if he came to the conclusion that they were as high as he would have earned if the accident had not happened, to refuse to award compensation. If he so held, in my opinion he was wrong. It was urged for the employers that the county court judge must be taken to have really exercised his discretion in the matter. I cannot find anything to shew that he considered any point but one, namely whether the workman was earning the same wages as he would have earned if he had never met with the accident. The workman, however, was not the same man as he had been before the accident, and was not in fact able to earn the same wages as before; and, looking forward, it might be that he would not continue to be fit for even light employment, or might lose it. If the judge had said in his judgment that he had considered these matters and all the circumstances of the case, we should be slow to interfere, for undoubtedly the matter is one within his discretion. It would seem, however, that he did not so treat the case, but merely acted on a statement of principle, which in my opinion is incorrect. The case must therefore be referred back to him that he may exercise his discretion in the matter, and I refrain from saying anything which might be construed as a direction to him with regard to the manner in which he ought to deal with the case when it comes before him again.

Appeal allowed.

Solicitors for workman: *Smith, Rundell & Dods, for Walter Morgan, Bruce & Nicholas, Pontypridd.*

Solicitor for employers: *H. Percy Becher, for Simons & Powell, Pontypridd.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1904
May 6.

STEPHENS *v.* DUDBRIDGE IRONWORKS COMPANY, LIMITED.

Employer and Workman—Infant Workman—Injury caused by Negligence of Employer — Claim under Workmen's Compensation Act — Subsequent Action for Negligence—Action more for Benefit of Infant than Claim—Exercise of Option not binding—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 2 (*b*).

A workman, who was an infant, received personal injuries caused by the negligence of his employers. He made a claim under the Workmen's Compensation Act, 1897, and the employers agreed to pay him and he received from them the maximum amount payable to him under the Act during his incapacity for work. He subsequently brought through his next friend an action for negligence, on which he recovered a sum much larger than the amount received as compensation under the Act:—

Held, that the Act, by including an apprentice in the general word "workman," did not alter the law applicable to contracts made by infants, and that the claim under the Act was no bar to the bringing of the subsequent action for negligence.

APPEAL by the defendants from a judgment of Bruce J. at the trial of the action.

The action was brought by the plaintiff, an infant suing by his next friend, to recover damages for personal injuries sustained while he was in the employment of the defendants. It appeared that the plaintiff was an apprentice who received 5*s.* a week as wages, and that his hand was injured while he was engaged in his work with a plane, driven by machinery which was admitted to have been insufficiently fenced. He was living at the time with an uncle, Richard Smith, his next friend in the present action, who was, however, not clothed with any of the rights or duties of legal guardianship. Richard Smith wrote to the defendants terming himself the guardian of John Stephens, the plaintiff, and describing the injuries that the plaintiff had received by the amputation of three fingers, and he concluded his letter by stating that he could not "do less than respectfully make a claim upon the company (under the Workmen's Compensation Act, 1897) for

C. A. 1904

STEPHENS v. DUDBRIDGE IRONWORKS COMPANY.

the sum of 50*l.* as a compensation for the loss of such fingers." The defendants replied by letter: "We are prepared to pay compensation to the injured lad in accordance with the Workmen's Compensation Act, i.e., half his weekly wages, but we cannot accede to your request for the lump sum mentioned, which is not in accordance with the Act under which you state you are making the claim. We are quite willing to pay him half wages, i.e., 2*s.* 6*d.* per week, for the third and subsequent weeks of disablement." On the following day the plaintiff received 12*s.* 6*d.* for the first five weekly payments, and signed a receipt as follows: "Received of the Dudbridge Ironworks Company, Limited, the sum of 12*s.* 6*d.*, being the first five of the successive weekly payments which I elect to accept under the Workmen's Compensation Act, 1897, in full satisfaction and discharge of all claims for compensation accrued or to accrue, in respect of all injuries or injurious results, direct or indirect, arising or to arise from an accident sustained by me on or about the 15th day of August last, whilst in the employment of the above." The plaintiff afterwards received other similar payments during his incapacity for work, and the total payments made to him amounted to the maximum which he was entitled to receive under the Workmen's Compensation Act, 1897, the whole sum being less than 1*l.* When capable of work he returned to the employment of the defendants at his former wages, and shortly afterwards was in receipt of higher wages. Afterwards a claim for compensation on the ground of the negligence of the defendants was made, and, as it was not assented to by them, Richard Smith was formally appointed guardian and next friend of the plaintiff, and this action was commenced. At the trial the learned judge held that the plaintiff, as an infant, was incapable of exercising an option which would be binding upon him whether to claim compensation under the Workmen's Compensation Act, 1897, or to proceed against the defendants on the ground of negligence; that it was clearly not in his interest to proceed under the Act, as the compensation that could be recovered under the Act would be much smaller than the damages which he could recover in an

action for negligence. The learned judge had no doubt that a claim for compensation had been made within s. 1, sub-s. 2 (*b*), but he held that the plaintiff was incapable of bargaining away his common law rights, and no proceedings had been taken in such a form as to be binding upon him. Judgment was therefore given for the plaintiff for a sum that had been agreed upon as damages, less the amount already received by the plaintiff.

The defendants appealed.

Ruegg, K.C. (with him *J. Corner* and *A. S. Poyser*), for the defendants. By the definition of "workman" in s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, that expression "includes every person who is engaged in an employment to which this Act applies whether his agreement is one of service or apprenticeship." It follows that in s. 1, sub-s. 2 (*b*), "apprentice" may be read in for "workman," and the Act confers upon an apprentice a statutory right to claim compensation under the Act, or to take the same proceedings as were open to him before the commencement of the Act. A notice of claim such as was made in the present case is sufficient: *Powell* v. *Main Colliery Co.* (1); and the consent of the employers to pay 2*s.* 6*d.* a week could have been recorded by the registrar of the county court under Sched. II. (8.) The acceptance of those terms was consequently the exercise of an option to proceed under the Act, and is a bar to other proceedings. In *Clements* v. *London and North Western Railway* (2) it was held that an agreement to become a member of an insurance society formed among the employees of the company was a part of the contract of service which it was competent for an infant to enter into. That case also shews that the question whether the option adopted by the plaintiff was to his advantage should be decided on consideration of the whole of the circumstances, and not in view of subsequent events, as was done in this case. Unless the agreement of an infant to accept compensation is held to be binding on him, the employer would not be safe in dealing with any case by agreement, and litigation

(1) [1900] A. C. 366. (2) [1894] 2 Q. B. 482.

C. A. 1904

STEPHENS v. DUDBRIDGE IRONWORKS COMPANY.

would be necessary; and this is in opposition to the scheme of the Act, which undoubtedly contemplated the settlement of most cases without legal proceedings.

A. T. Lawrence, K.C. (with him *Morton Brown*), for the plaintiff. Rule 10a of the Rules of 1900 enables an employer to initiate proceedings, so that the suggested difficulty of an employer in arriving at a settlement with an infant does not exist.

[He was stopped.]

COLLINS M.R. The plaintiff in this case, an infant suing by his next friend, has brought an action at common law to recover damages for injuries sustained by him through the negligence of his masters in not properly fencing machinery on which he was employed. At the trial the allegation of negligence was accepted, and the only question before the learned judge was the liability of the defendants. That question arose out of the fact that certain proceedings had been previously taken by the plaintiff, which it was contended prevented him from succeeding in this action. Immediately after the accident happened, a claim was put in on his behalf by his uncle, which purported to be a claim for a sum of money under the Workmen's Compensation Act, 1897. The employers replied that they were willing to pay compensation under the Act, but that they could not pay a lump sum, and that the compensation they were willing to pay was half the plaintiff's weekly wages—that is, 2*s.* 6*d.* a week. After that the plaintiff received some arrears of this payment, and signed a receipt in the fullest terms accepting the offer to receive 2*s.* 6*d.* a week in full satisfaction of his claim, and he received that amount weekly until he was restored to health. Subsequently a notice was sent to the employers claiming compensation on the ground that the machinery had been imperfectly protected, and on that this action was brought in the High Court. The question is whether the plaintiff is debarred from recovering in this action by his previous acceptance of compensation under the Workmen's Compensation Act.

Under s. 1, sub-s. 2 (*b*), of the Act an option is given to a

workman either to claim compensation under the Act or take proceedings independently of the Act. Upon this it is contended that the plaintiff, who was an apprentice, is classed as a workman by the definition clause, and that being so it is said that he has been given the same option as is given to a workman, and that there is in effect a statutory permission given to a person under age to exercise an option which would be binding on him. I do not think that the power so given has the effect of taking the case out of the ordinary law governing the contracts of infants. Ordinarily an infant cannot be bound by a contract which is not for his benefit, and in this case the learned judge came to a clear conclusion that the agreement made by the plaintiff was not for his benefit. In arriving at that conclusion he decided the only question essential to the right of the plaintiff to recover in this action.

The fact that a person under age may be in full possession of his faculties and earning the wages of a man does not affect the law applicable to a contract made by him. Whenever such a contract comes before a Court of law, the question whether it was for the benefit of the infant has to be considered, and the contract will not be enforced unless the Court is of opinion that it was for the benefit of the infant. The Workmen's Compensation Act, by including an apprentice in the general word "workman," does not, in my opinion, in any respect alter the law applicable to contracts made by infants.

I am of opinion that the judgment of Bruce J. was right, and this appeal consequently fails.

ROMER L.J. I am of the same opinion. The agreement made by or on behalf of the plaintiff for compensation under the Workmen's Compensation Act, 1897, does not estop him from bringing the present action, and does not constitute a defence to it. I can find no provision in the Act which operates to alter the law relating to contracts made by infants, and in my judgment the decision of the learned judge must be supported.

C. A. 1904

STEPHENS v. DUDBRIDGE IRONWORKS COMPANY.

MATHEW L.J. I am of the same opinion. It is clear to my mind that the Legislature in the provisions of the Workmen's Compensation Act, 1897, which have been relied on, did not intend to inflict a disability on an infant and prevent his setting aside a contract not made for his benefit. That being so, I am clearly of opinion that in the circumstances of this case the judgment of the learned judge was right, and that the appeal must be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *C. T. Courtney Lewis, for W. Langley-Smith, Gloucester.*

Solicitors for defendants: *Watson, Sons & Room, for Wansbrough & Co., Bristol.*

A. M.

1904

Feb. 29; *March* 28.

GRAND JUNCTION WATERWORKS COMPANY, APPELLANTS; RODOCANACHI, RESPONDENT.

Water—Supply—Waterworks Company—Neglect or Refusal to Supply—Defect in Communication Pipes—Liability of Consumer to Repair—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *s.* 43—*Metropolis Water Act*, 1871 (34 & 35 *Vict. c.* 113), *ss.* 27, 28, 29, 32.

A water company in the metropolis, who were furnishing a consumer with a constant supply of water for domestic purposes, the pipe communicating with his premises being attached to the company's main under the roadway of a public street, opened up the roadway and found a defect in the communication pipe causing a serious waste of water. They thereupon gave him written notice to repair the pipe forthwith; and, upon his failing so to do, they cut off the water supply to his premises at the main, and refused to supply him until the pipe was repaired. By s. 28 of the Metropolis Water Act, 1871, in the case of a constant supply every owner or occupier, upon whom notice in that behalf has been served under the Act, shall provide the prescribed fittings and shall from time to time keep the same in proper repair. By s. 3 the term "fittings" includes communication pipes. By s. 32, if any person supplied with water by the company wrongfully fails to do anything which, under the provisions of the Act, ought to be done for preventing the waste of the company's water, they may cut off his supply and cease to supply him with water so long as the injury remains or is not remedied:—

Held, that, on the facts stated above, the company were entitled to cut off the supply until the pipe was repaired, and therefore that they were not liable to the penalty imposed by s. 43 of the Waterworks Clauses Act, 1847, for "neglecting or refusing" to supply water to consumers.

CASE stated by a metropolitan police magistrate.

The respondent preferred an information against the appellant waterworks company under s. 43 of the Waterworks Clauses Act, 1847 (1), for refusing, on June 6, 1903, to furnish a supply of water to him at 113, Eastbourne Mews Road.

At the hearing of the information the following material facts were proved or admitted:—

The respondent was the lessee of a stable with a dwelling-house above, being No. 113, Eastbourne Mews, under a lease by the terms of which the lessor was liable for all external repairs. The dwelling-house was inhabited by two grooms in the respondent's employment. The appellants, a company incorporated and authorized by their special Act to supply water throughout a district which included 113, Eastbourne Mews, supplied water for domestic purposes to the respondent's premises, the supply being a constant supply under the provisions of the Metropolis Water Acts, 1852 and 1871. Eastbourne Mews is a public street repairable by the local authority. The water rate for the period from June 6 to June 10, 1903, was to be taken to have been paid. On June 6 the appellants discovered that there was a serious leak in the communication pipe close to the junction of that pipe with the appellants' main under the roadway. The communication pipe was the property of the respondent. The appellants' ganger, who had opened up the ground, thereupon served upon the respondent's coach-

(1) 10 & 11 Vict. c. 17, s. 43: "If, except when prevented as aforesaid" (namely, by frost, unusual drought, or other unavoidable cause or accident, or during necessary repairs, as set forth in s. 42), "the undertakers neglect or refuse to furnish to any owner or occupier entitled under this or the special Act to receive a supply of water during any part of the time for which the rates for such supply have been paid or tendered, they shall be liable to a penalty of ten pounds, and shall also forfeit to every person having paid or tendered the rate the sum of forty shillings for every day during which such refusal or neglect shall continue after notice in writing shall have been given to the undertakers of the want of supply."

1904

GRAND JUNCTION WATERWORKS COMPANY v. RODOCANACHI.

man, who was on the premises, a notice in writing addressed to the occupier of 113, Eastbourne Mews Road, in the following terms: "Sir,—Upon opening the ground opposite No. 113, Eastbourne Mews a leakage of water was found to exist from the defective state of your communication pipe, and unless you forthwith repair the same it will be the duty of the company to disconnect such pipe from their main. Immediately after the repair, rendered easy by the ground being now open, the company will reconnect the pipe with their works, and will undertake to fill in and make good the ground upon payment of the expenses incurred thereby, amounting to 15*s*." No steps having been taken by the respondent or his coachman to have the communication pipe repaired or the waste of water stopped, the appellants, on the same June 6, cut off the water supply at their main, and it remained cut off until June 10, when the repairs were executed by the appellants at the request of the respondent's landlady, and the water supply was thereupon restored. The time occupied in executing the repairs was about two hours, and it was necessary that the supply should be disconnected during the repairs. The respondent had, in the afternoon of June 6 (Saturday), written and posted a letter to the appellants informing them of the want of supply, and threatening proceedings against them. That letter was received by the appellants on June 8.

The magistrate found as a fact that there had been no negligence on the part of the respondent, and held that the appellants had "neglected or refused to furnish the respondent with a supply of water" within the meaning of s. 43 of the Waterworks Clauses Act, 1847. He therefore convicted them, and imposed a penalty of 6*l*., being at the rate of 2*l*. per day for June 8, 9, and 10, 1903, respectively.

The questions for the opinion of the Court were—

1. Whether upon the facts stated the magistrate properly convicted the appellants.

2. Whether he was justified in inflicting a penalty of 6*l*.

Macmorran, K.C. (*Acland, K.C.*, with him), for the appellants. On the facts stated in the case the appellants did not

commit any offence under s. 43 of the Waterworks Clauses Act, 1847. Upon the true construction of the statutory provisions affecting the matter they were legally justified in cutting off the supply until the respondent had repaired the defect in his communication pipe. By s. 27 of the Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), in the case of a constant supply the water company may cause to be served upon the owner or occupier of the premises a notice requiring him to supply the premises with the prescribed fittings, and by s. 3 the term "fittings" includes communication pipes. By s. 28 every owner or occupier upon whom the notice has been served shall, within two months from the date of the service, provide the prescribed fittings, "and shall from time to time keep the same in proper repair." By s. 29, where in any district any company is required or has proposed to provide a constant supply, and any owner or occupier has, after notice, made default in providing the prescribed fittings, the company may themselves provide the fittings; and where the fittings of any person are out of order and not as prescribed, the company may by notice in writing "require such person, within twenty-four hours after the date of the service of such notice, to cause the same to be repaired, so as to prevent any waste of water; and if any person fail to comply with the terms of such notice such company (if they think fit) may repair the fittings of such person." Sect. 32 renders a person provided with a constant supply liable to a penalty if he "wilfully or negligently causes or suffers any fittings to be out of repair, or to be so used or contrived as that the water supplied to him by such company is or is likely to be wasted"; and "if any person supplied with water by such company wrongfully does or causes or permits to be done anything in contravention of the provisions of the special Act or this Act, or wrongfully fails to do anything which, under any of those provisions, ought to be done for the prevention of the waste of the water of such company they may (without prejudice to any remedy against him in respect thereof) cut off any of the pipes by or through which water is supplied by them to him or for his use, and may cease to supply him with water, so long as the cause of injury remains or is not remedied."

1904

GRAND JUNCTION WATERWORKS COMPANY v. RODOCANACHI.

The owner or occupier is, therefore, bound to keep in repair his communication pipe; the company, although they may repair it if they think fit, are not bound to repair it, and s. 32 gives them power to cut off the supply if the owner or occupier makes default in repairing. The decision in *Sheffield Waterworks Co.* v. *Wilkinson* (1) supports the proposition that the appellants were not bound to supply water to the respondent's premises until he had restored the communication.

W. Finlay, for the respondent. The magistrate's decision was right. The respondent had no power to break open the public road for the purpose of repairing his communication pipe, and was, therefore, not liable to repair it: *Chapman* v. *Fylde Waterworks Co.* (2) No such power is given by the Metropolis Water Act, 1871. Sect. 53 of the Waterworks Clauses Act, 1847, enacts that every owner or occupier of a dwelling-house within the limits of the special Act shall, when he has laid his communication pipes and paid or tendered the water rate, be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes. The decision in *Sheffield Waterworks Co.* v. *Wilkinson* (1) cannot mean that, if once the communication pipes have been cut, the owner or occupier ceases to be a person entitled to a supply until the communication is restored. It is true that Bramwell L.J. said (3) that an authority for the owner or occupier of the premises to break up the soil of the roadway for the purpose of reconnecting the existing pipes seemed to follow as a necessary consequence from the general provisions of the statute; but the Metropolis Water Act, 1871, did not apply to that case; no question of the "prescribed fittings" arose, and the "prescribed fittings" under the Act of 1871 mean, it is contended, fittings within the consumer's own premises. The appellants can only justify cutting off of the supply under s. 32 of the Act of 1871. Sect. 29 deals only with a default by the consumer which is not wrongful, but the provisions of s. 32 are highly penal, and in order to make them apply there must be a wrongful act or default by the consumer. Here the magis-

(1) (1879) 4 C. P. D. 410. (2) [1894] 2 Q. B. 599.
(3) 4 C. P. D. at p. 421.

trate has found that the respondent was not guilty of any wrongful act or negligence, and the appellants are not entitled to rely on the second part of s. 32. Further, the duty, if any, to repair the communication pipe rested upon the respondent's landlady, and not upon the respondent.

Macmorran, K.C., replied.

Cur. adv. vult.

March 28. The following judgment of the Court (Lord Alverstone C.J., Wills and Kennedy JJ.) was read by

LORD ALVERSTONE C.J. This was an appeal upon a special case stated by Mr. d'Eyncourt, police magistrate, in a complaint preferred by the respondent against the appellants for refusing to furnish a supply of water, contrary to s. 43 of the Waterworks Clauses Act, 1847. The case was extremely well argued by Mr. Macmorran on behalf of the appellants, and Mr. Finlay on behalf of the respondent, and raises a point of general importance. It is not necessary to refer to the facts in detail, as to which there was no dispute and which are clearly set out in the special case; it is sufficient to say that on Saturday, June 6, 1903, a leak having occurred under the roadway opposite 113 Eastbourne Mews, the road was opened and the leak was found to be in the communication pipe, the property of the consumer. Notice was thereupon given to the respondent's coachman, who was occupying the premises which were supplied with water, to repair the pipe, and the notice stated that it would be the duty of the company to disconnect if the pipe was not repaired. The respondent took no steps to repair it, and the water was then cut off by the company. The pipe was subsequently repaired by the appellants at the request of the respondent's landlady. The magistrate convicted the appellants, the water company, and fined them a penalty of 6*l.* for neglecting, or refusing, to supply water in accordance with s. 43. The question we have to consider is whether there was any evidence upon which this conviction can be supported. It must, we think, be taken upon these facts, and, in fact, it was so stated in the course of the argument, that the only

1904

GRAND JUNCTION WATERWORKS COMPANY v. RODOCANACHI.

Lord Alverstone C.J.

refusal to supply the water was by the company's cutting it off upon June 6, and continuing to keep the water cut off until it was again supplied on the 10th. The questions we have to decide are whether, in the metropolis, if a leak is found in a pipe belonging to a consumer, the company is entitled to cut off the water until the pipe is restored; and, secondly, does a refusal to supply under the circumstances of the present case constitute an offence under s. 43? It is found as a fact in the case, and for reasons which we will state later on it must be the fact, that the pipe was the property of the consumer—i.e., the owner of the premises let to the respondent. Under s. 43 of the Waterworks Clauses Act, 1847, if the undertakers, except when prevented, as provided in an earlier section, neglect or refuse to furnish to any owner or occupier entitled under the Waterworks Clauses Act, or the special Act, to receive it, a supply of water during any part of the time during which the rates for such supply shall have been settled, or tendered, they shall be liable to a penalty. The exception referred to in the earlier words of that section is to be found in the provisions of s. 42, and does not, in our opinion, apply. Under s. 28 powers are given to the undertakers to open the streets and lay down service pipes and other works for the supply of water; under s. 29 they may not enter private property without consent, except in a case which does not apply here, and by s. 30, before breaking up the street, they must give certain notices. By s. 48 the owner or occupier of any dwelling-house who wishes to have water brought into his premises may open the ground between the pipes of the undertakers and his premises and lay communication pipes, and s. 52 empowers such owner or occupier to open or break up the street for such purpose. There are also provisions in ss. 44–47 as to the laying of communication pipes by the undertakers which are only material as supporting the view that communication pipes are, under ordinary circumstances, the property of the consumer. The Metropolis Water Act, 1871, contains a group of sections—ss. 26–32—which were referred to in argument and require consideration. Under these sections the company may prescribe fittings, which by

the interpretation clause, s. 3 of the same Act, include communication pipes, and s. 28 provides that in the case of a constant supply the owner or occupier of the premises shall provide all supply fittings, and from time to time keep the same in proper repair. Sect. 29 enables the company, if the fittings are out of order, to give notice requiring the owner or occupier within twenty-four hours to cause the same to be repaired so as to prevent any waste of water, and, if any person fails to comply with the terms of such notice, the company may repair the fittings of such person and may recover the expenses incurred. Sect. 32 provides that if any person wilfully or negligently causes or suffers any fittings to be out of repair, or to be so used that the water supplied to him is likely to be wasted, he shall be liable to a penalty, and the second paragraph of the same section provides that, if any person supplied with water wrongfully fails to do anything which ought to be done for the prevention of waste, the company may cut off any pipes by or through which the water is supplied to such customer, and may cease to supply him with water as long as the cause of injury remains or is not remedied. It will have been observed that neither the Waterworks Clauses Act nor the Metropolis Water Act, 1871, nor any other Act to which our attention has been called, contains any express provision giving the consumer the right to open the street for the purpose of repairing the pipe, and this we gather from the statement in the special case and from the judgment of the learned police magistrate to be one of the grounds on which he decided against the appellants. It is true that Bramwell L.J., sitting in the Court of Queen's Bench, expressed the opinion, in the case of *Sheffield Waterworks Co.* v. *Wilkinson* (1), that the right to break up the soil followed from the right which the consumer had to lay down fresh pipes for the purpose of obtaining a supply, and it may be that the obligation imposed upon the owner and occupier by s. 28 of the Metropolis Water Act, 1871, to keep the prescribed fittings, which include communication pipes, in proper repair may give the consumer a right to open the road for the purpose of

(1) 4 C. P. D. 410, at p. 421.

1901

GRAND JUNCTION WATERWORKS COMPANY v. RODOCANACHI.

Lord Alverstone C.J.

repair. On the other hand, the Court of Appeal, in the case of *Chapman* v. *Fylde Waterworks* (1), expressly decided that the Waterworks Clauses Act gave the consumer no power to open streets for the purpose of repair. In the view, however, we take, this does not seem to us to be conclusive of the case. The question still remains—Is the consumer who, having the opportunity of doing so without opening the street, does not choose to repair his own communication pipe a person entitled to demand a supply of water under s. 43? We do not think for the purpose of this question that any distinction can be drawn between owner and occupier. It was contended on behalf of the respondent that the duty of repairing the pipe rested with his landlord. The water company have no means of knowing what the contractual relations between the occupier and his landlord are, and, in our opinion, the liability of the company in respect of an offence under s. 43 cannot depend upon the relations between the owner and occupier of the premises. No question in this case arises as to the opening of the street. The street was opened by the company; notice was given, and the company offered to reconnect the pipe upon payment of the expenses; they at the same time gave notice that if the pipe was not repaired the water would be cut off. In our opinion the duty to repair the defect in the communication pipe is by s. 28 of the Act of 1871 cast upon the owner or occupier. We think that the owner or occupier who, after notice to him that the communication pipe belonging to him is out of repair, permits the pipe to remain in a condition in which it would cause waste of water has wrongfully failed to do something to prevent the waste within the meaning of the second paragraph of s. 32 of the Act of 1871, and under these circumstances the company were entitled to cut off the water and to cease to supply him as long as the injury to the pipe remained unremedied. It might be that the owner or occupier of a house did not wish to continue the supply, or preferred to put in a better, larger, or different communication pipe. The fact that the company could, if they were so minded, have repaired the pipe after twenty-four hours' notice under s. 29

(1) [1894] 2 Q. B. 599.

does not disentitle them from exercising their rights under s. 32, and we therefore think that the owner or occupier who, under such circumstances as the present, will not repair the pipe which causes the waste, is not a person entitled to receive a supply of water under s. 43. We think the true view to be taken of the facts is that indicated by the Court in *Young* v. *Southwark and Vauxhall Water Co.* (1); and, although no doubt in one sense it may be said that the question is one of fact, we think that the magistrate ought as a matter of law, upon the evidence in this case, to draw the conclusion which we have indicated upon the facts as stated. The appeal will therefore be allowed, with costs.

Judgment for the appellants.

Solicitors for appellants: *Bircham & Co.*
Solicitors for respondent: *Markby, Stewart & Co.*

(1) (1893) 69 L. T. 144.

W. A.

1904
April 27.

WEARDALE AND CONSETT WATER COMPANY *v.* CHESTER-LE-STREET CO-OPERATIVE SOCIETY.

Waterworks Company—Water for extinguishing Fire—Obligation to allow use of Water gratuitously—Waterworks Clauses Act, 1847 (10 & 11 *Vict.* *c.* 17), *s.* 42.

By s. 42 of the Waterworks Clauses Act, 1847, "The undertakers shall at all times keep charged with water all their pipes to which fireplugs shall be fixed and shall allow all persons at all times to take and use such water for extinguishing fire without making compensation for the same."

The plaintiffs, a water company, were possessed of a water main, from which there ran across a field of the defendants a pipe, the property of the defendants, through which the plaintiffs supplied the defendants with water for agricultural purposes. In this pipe the plaintiffs had at the request and expense of the defendants fixed a fireplug. A haystack of the defendants having caught fire, the defendants by means of the fireplug in their pipe used the plaintiffs' water for the purpose of extinguishing the fire. To a claim by the plaintiffs for payment for the water so consumed, the defendants pleaded that under the provisions of s. 42 they were entitled to use the water gratuitously. There was no evidence that there were any fireplugs in the plaintiffs' main :—

Held, that the privilege conferred by s. 42, of taking water without payment for extinguishing fire, was confined to water taken from pipes of the undertakers to which fireplugs were fixed, and that in the absence of evidence of there being fireplugs in the plaintiffs' main the defendants were liable to pay for the water taken.

APPEAL from the county court of Durham.

The plaintiffs were possessed of a water main running along a road called Picktree Lane within the district of the town commissioners of Chester-le-Street. About the year 1886 the plaintiffs, at the request of the defendants, laid a pipe from the main in Picktree Lane through a field of the defendants for a distance of 180 yards to a cattle trough of the defendants. Through that pipe they supplied the defendants by agreement with water for agricultural purposes at a rent of 16*s.* a year. In 1890 the plaintiffs, at the request and expense of the defendants, fixed a fireplug in the defendants' pipe near the trough for the purpose of protecting certain haystacks from fire. There were no

buildings in the neighbourhood of the trough, the land being purely agricultural. There was no agreement as to the terms upon which the water through the fireplug might be used for extinguishing fire. In July, 1903, a haystack of the defendants near the cattle trough caught fire, and the defendants by means of the fireplug used the defendants' water to extinguish the fire. The plaintiffs claimed to be paid for the amount of the water so consumed. The defendants relied on s. 42 (1) of the Waterworks Clauses Act, 1847, as entitling them to take the water without payment. There was no evidence that there were any fireplugs fixed in the plaintiffs' main in Picktree Lane. There were no houses in Picktree Lane, which, although within the limits of the urban district, was situate outside the town of Chester-le-Street. The county court judge held that there was nothing in the language of s. 42 requiring the water to be drawn through the undertakers' fireplugs, and that the defendants were entitled to succeed. The plaintiffs appealed.

Meynell, for the plaintiffs. Sect. 42 does not confer a general power upon the public to take the company's water gratuitously for extinguishing fire at any point where they can get it. The words "such water" refer to the water in the undertakers' pipes to which fireplugs are fixed under the provisions of s. 38, and which pipes the undertakers are required to keep charged under high pressure. There is no obligation upon the undertakers to put fireplugs in private service pipes, or to keep those private pipes charged under pressure. Therefore the defendants cannot claim to take the water gratuitously from their own fireplug. If it be said that they took the water

(1) By the Waterworks Clauses Act, 1847, s. 38, "The undertakers, at the request of the town commissioners, shall fix proper fireplugs in the main and other pipes belonging to them" at certain distances.

Sect. 40: "The cost of such fireplugs and the expense of fixing, placing, and maintaining the same in repair shall be defrayed by the town commissioners."

Sect. 42: "The undertakers shall at all times keep charged with water under such pressure as aforesaid all their pipes to which fireplugs shall be fixed and shall allow all persons at all times to take and use such water for extinguishing fire without making compensation for the same."

1904

WEARDALE AND CONSETT WATER COMPANY v. CHESTER-LE-STREET CO-OPERATIVE SOCIETY.

from the company's main in Picktree Lane, there is no evidence that that main is one of the class of pipes mentioned in s. 42, namely, "pipes to which fireplugs shall be fixed."

Simey, for the defendants. The meaning of s. 42 is that for the public purpose of extinguishing fire within the district of the town commissioners the company's water may at all times be taken without compensation, and that in order to enable them to do so the undertakers are to provide fireplugs and keep their mains charged. "Such water" means nothing more than "the undertakers' water." No reason has been suggested why the public's right should be confined to water taken from pipes of the kind specified in the first part of the section. Secondly, assuming that "such water" means water taken from the undertakers' pipes to which fireplugs are fixed, the water was in this case so taken. It was taken from the main in Picktree Lane by means of the defendants' pipe. Had the water been conducted to the fire from the main by means of a leather hose it could not be disputed that it was taken directly from the main, and no distinction for this purpose can be drawn between a fixed pipe belonging to the consumer and a flexible hose. And, though there is no evidence to that effect, it must be presumed that the main was a pipe to which fireplugs were fixed. The duty of requiring fireplugs to be fixed to the mains lay on the town commissioners, and it must be assumed primâ facie that they discharged their duty. Then if the water be taken from a pipe of the undertakers to which fireplugs are fixed, there is nothing in the section which says that the water must be taken through the particular orifice of the fireplug. Thirdly, the use of the water for extinguishing the fire in a haystack was a use for an agricultural purpose, and was consequently covered by the agreed rent of 16*s*.

LORD ALVERSTONE C.J. In my opinion no one reading s. 42 of the Waterworks Clauses Act, 1847, could fairly come to the conclusion that it was intended to give a general right to the public under all circumstances to take the undertakers' water for the purpose of extinguishing fire without payment. Sect. 42 is one of a group of sections relating to fireplugs, the

first of which (s. 38) provides that "the undertakers, at the request of the town commissioners, shall fix proper fireplugs in the main and other pipes belonging to them." Sect. 42 provides that, "the undertakers shall at all times keep charged with water under such pressure as aforesaid all their pipes to which fireplugs shall be fixed and shall allow all persons at all times to take and use such water for extinguishing fire without making compensation for the same." The language of that section plainly says that only "such water," that is, water in "their"—the undertakers'—"pipes to which fireplugs shall be fixed," is to be taken without payment for extinguishing fire. It has been contended that that cannot be the meaning of the section, because there is no reason why the Legislature should have so limited the class of water to be taken gratuitously for that purpose. Whether a sufficient reason for that limitation can be suggested or not, I feel bound to give the words their ordinary signification, and to hold that the privilege is so limited. To hold otherwise would be to strain the language of the section. Then Mr. Simey contends that the defendants by means of their private pipe took the water directly from the plaintiffs' main in Picktree Lane. Now here there is no evidence whether there were any fireplugs fixed in the plaintiffs' main in Picktree Lane, and, as the onus must lie upon the person claiming to take the water gratuitously to shew that the pipe from which he takes it is of the kind specified in s. 42, we must assume that there were no such fireplugs; therefore, even assuming that the defendants' contention was right that their private service pipe leading to the trough was equivalent to a hose whereby they took the water directly from the plaintiffs' main, still they would fail to bring themselves within the provisions of s. 42. Whether, if the main in Picktree Lane had had fireplugs fixed in it, the defendants would have been entitled to take the water gratuitously through the medium of their private pipe, or whether to bring themselves within the section they were bound to take the water from the main through one of the town commissioners' fireplugs and through no other orifice, is a question which does not arise.

1904

WEARDALE AND CONSETT WATER COMPANY v. CHESTER-LE-STREET CO-OPERATIVE SOCIETY.

WILLS J. I am of the same opinion. It is clear that under s. 42 the water which may be taken for extinguishment of fire without payment must pass through pipes supplied with fireplugs. It is immaterial to inquire why this provision should be confined to pipes to which fireplugs are fixed. The Act of Parliament says so, and that is enough. If Mr. Simey's contention is right, the words "to which fireplugs shall be fixed" have no meaning and ought to have been omitted from the section. With regard to the contention that water used for putting out a fire in a haystack is water used for agricultural purposes, it seems to me as extravagant as to say that water used for putting out fire in a house is used for domestic purposes.

KENNEDY J. I agree, and have nothing to add.

Appeal allowed.

Solicitors for plaintiffs: *Rowcliffes, Rawle & Co., for Cooper & Goodyer, Newcastle-upon-Tyne.*

Solicitors for defendants: *Dangerfield & Blythe, for J. Turnbull, Durham.*

J. F. C.

FRASER *v.* FRASER.

1904
April 18.

Practice—Appeal—Reference of Action to Master—Order XIV., *r.* 7.

Where an action is referred to a master under Order XIV., r. 7, he is in the position of an arbitrator, and no appeal lies from his decision.

APPEAL from the decision of a master in an action referred to him under Order XIV., r. 7. (1)

The action was brought to recover a sum for commission on the sale of shares. The defendant counter-claimed for money paid by him for the plaintiff. On an application by the plaintiff for judgment under Order XIV., the judge at chambers gave the defendant leave to defend, and by consent under Order XIV., r. 7, ordered the action to be referred for decision by a master. The master found that, after allowing the defendant the amount due on his counter-claim, there remained a balance due to the plaintiff, and he directed judgment to be entered in accordance with that finding. From that judgment the defendant appealed to the Court of Appeal. The appeal was dismissed upon the ground that, assuming that an appeal lay from the decision of a master under Order XIV., r. 7, a point which the Court did not think it necessary to decide, it at all events did not lie directly to the Court of Appeal. The defendant then appealed from the master to the Divisional Court, the ground of the appeal being that the finding was against the weight of the evidence.

Trevor Lloyd, for the plaintiff. No appeal lies at all from the master's decision. Under rule 7 the reference to a master can only be made by consent. As he only gets his jurisdiction by consent he is in the position of an arbitrator, and his decision is final. Under Order XXXV., r. 9, it is provided that any person affected by a decision of a district registrar may

(1) Order XIV., r. 7: "Upon the hearing of the application, with the consent of the parties, an order may be made referring the action to a master, or the action may be finally disposed of without appeal in a summary manner."

1904

FRASER v. FRASER.

appeal to a judge, "notwithstanding that the order or decision was in respect of a proceeding or matter as to which the district registrar had jurisdiction only by consent." That it should have been thought necessary to insert that provision shews that but for that provision the consent of the parties would have made the decision of the district registrar final.

Hume-Williams, K.C., and *McCarthy*, for the defendant. A right of appeal against the direction of the master in such a case as the present is given by the combined effect of rules 6 and 6 (*a*) of Order XL. By rule 6, "Where at a trial by a referee he has directed that any judgment be entered, any party may move to set aside such judgment, and to enter any other judgment on the ground that upon the finding as entered the judgment so directed is wrong; provided that in the Queen's Bench Division such motion shall be made to a Divisional Court." And by rule 6 (*a*), rule 6 is to apply "to a reference to any officer of the Court under an order of the Court"; that includes a reference to a master under Order XIV., r. 7. If there is no such right of appeal, the benefit of the last-mentioned rule is materially diminished. The earlier part of that rule was designed to provide an alternative procedure for that of putting the action into the short cause list, in cases in which a trial before the judge in Court was not suitable; but it was not intended that the parties by consenting to that alternative mode of trial should be deprived of their right of appeal. The rule pointedly contrasts an agreement that the action be referred to a master with an agreement that it should finally be disposed of without appeal in a summary manner. The language suggests that the former is not to be without appeal. The case is not like that of *Darlington Wagon Co.* v. *Harding* (1), where the order of reference, made by consent of the parties, was not confined to the reference of the action, but included all matters in difference.

Trevor Lloyd, in reply.

LORD ALVERSTONE C.J. The question in this case is whether, where an order has been made with the consent of the parties

(1) [1891] 1 Q. B. 245.

1904

FRASER v. FRASER.

Lord Alverstone C.J.

referring the action to a master under Order XIV., r. 7, any appeal lies from the decision of the master. In my opinion, the meaning of the rule is that the master is to be in the position of an arbitrator. In old days before the Judicature Acts it was a common thing to refer a case to the Queen's Bench masters with the consent of the parties, and where cases were so referred to a master he was an arbitrator and there was no review. I cannot believe that under the words of this rule it was intended to destroy the old practice. Mr. Hume-Williams has relied upon Order XL., r. 6 (*a*), which provides that "Rules 2 and 6 of Order XL. shall apply to a reference to any officer of the Court under an order of the Court." And rule 6 is to the effect that where a referee has directed that any judgment be entered any party may move to have the judgment set aside "on the ground that upon the finding as entered the judgment so directed is wrong." That only allows an appeal where the judgment is not in accordance with the finding; it does not allow of any appeal from the finding itself, and that is what it is sought to appeal from here. Those rules are not in any way inconsistent with the view that there is no appeal from a master under Order XIV., r. 7, on a question of fact. Without saying that the judgments of the Court of Appeal, when this case was recently before them (1), are to be regarded as an authority upon this point, for they expressly left the point open, still the dicta of the judges shew that they distinctly inclined to the view that there is no appeal at all. Cozens-Hardy L.J. in terms said that the language of the section indicated a reference "to a person who is to be an arbitrator, or in the nature of an arbitrator."

WILLS J. I am of the same opinion. Order XIV., r. 7, upon which this question turns, has no doubt not been very happily worded. But inasmuch as no order of reference can be made under it except by consent, there can be no à priori argument urged one way or the other as to why there should or should not be an appeal, because whatever is done is done by consent of the parties. It is beside the mark to suggest that there is

(1) [1904] 1 K. B. 56.

1904

FRASER v. FRASER.

Wills J.

anything unreasonable in supposing that they consented to forego a right of appeal. Nor can any argument, in my opinion, be founded upon the use of the disjunctive "or" between the two limbs of the rule to shew that the exclusion of the right of appeal was intended to be confined to the latter limb. I think that the words "without appeal" were wanted in the latter limb, because if the master takes upon himself then and there to dispose of the matter he does so without any order of reference at all, and therefore, primâ facie, there would be the ordinary right of appeal from his decision to the judge. It seems to me that the only thing to do is to look at the words of the rule, and to see what is the natural meaning to put upon them. The phrase "that the action be referred" is a very old one, and it was ordinarily understood as meaning that the action was sent to be dealt with by an arbitrator. And why it should not mean that in this rule I do not know. Then, if that be so, the rules of the Arbitration Act which apply to an ordinary arbitration apply here, and not those which apply to special references to official or special referees, whose jurisdiction is confined to reporting, or as to whom special rights of reviewing their decisions have given rise to rules specially relating to them. It seems to me that this must be regarded as an ordinary reference. This was the view of Cozens-Hardy L.J., and apparently also of Mathew L.J.

KENNEDY J. I am of the same opinion. The phrase "an order may be made referring the action to a master" had, I think, a well-understood meaning at the time of the framing of this rule, and I cannot for my part see any difficulty in supposing that it was intended to be interpreted in that well-recognised sense. The reference of an action to a master meant that he was treated as an ordinary arbitrator, with the consequence that there would be no appeal from his decision. It is argued that that meaning ought not to be put upon the rule, upon the ground that the express provision in the latter limb of the rule, that the summary disposal of the action is to be without appeal, excludes the notion that the decision of the master upon a reference under the first limb is also to be with-

out appeal. To my mind there are two answers to that. In the first place, the words "without appeal" were needed in the second limb. If the rule had run, "Upon the hearing of an application with the consent of the parties the action may be finally disposed of in a summary manner," there would have been the ordinary right of appeal to the judge. Secondly, if our view is right, to have inserted the words "without appeal" in the first limb would have been superfluous and misleading. The expression "referring the action to a master" being of itself a well-understood and complete expression, importing that there was no right of appeal, to have introduced the words "without appeal" would only have created confusion by suggesting that it was some new kind of reference with limitations not heard of before. Though no doubt the Court of Appeal left open the point as to whether there was any appeal at all from the master in this case, both Mathew and Cozens-Hardy L.JJ. expressed themselves in terms which go far to support our view.

Appeal dismissed.

Solicitors for defendant: *Williams & Neville.*
Solicitors for plaintiff: *Harratt & Pollock.*

J. F. C.

C. A.
1904
April 21, 22.

[IN THE COURT OF APPEAL.]

JOHNSTON *v.* GREAT WESTERN RAILWAY COMPANY.

Practice—Application for New Trial—Action for Personal Injuries—Railway Accident — Prospective Loss of Income — Excessive Damages — Matters wrongly considered by Jury or wrong measure of Damages adopted.

The rule laid down in *Praed* v. *Graham*, (1889) 24 Q. B. D. 53—that a new trial will not be granted on the ground of excessive damages unless, having regard to all the circumstances of the case, the Court is of opinion that the amount is so large that no twelve men could reasonably have given it—must be construed in the light of other decisions of the Court of Appeal., e.g., *Phillips* v. *London and South Western Ry. Co.*, (1879) 4 Q. B. D. 406; 5 Q B. D. 78, the effect of which is that a verdict may be set aside and a new trial granted if the Court, without imputing perversity to the jury, comes to the conclusion, from the amount of the damages and the other circumstances, that the jury must have taken into consideration matters which they ought not to have considered, or applied a wrong measure of damages.

The decision in *Rowley* v. *London and North Western Ry. Co.*, (1873) L. R. 8 Ex. 221, adopted as shewing that, in awarding damages for a prospective loss of income from professional or other earnings, the jury ought not to give the plaintiff such a sum as, if invested, would produce the full amount of income which he would probably have earned, but ought in estimating the damages to take into account the accidents of life and other matters, and to give the plaintiff what they consider under all the circumstances a fair compensation for his loss.

APPLICATION by the defendants for judgment or a new trial of the action.

The action was brought to recover damages for personal injuries caused to the plaintiff by an accident to a train in which he was travelling on the defendants' railway. He was then twenty-eight years of age. The defendants admitted that the accident was caused by the negligence of their servants, and the only question was as to the amount of damages to which the plaintiff was entitled.

The muscles of the plaintiff's left thigh were seriously injured, and he was under medical treatment for some months. After he was able to walk about again his left knee was very

liable to give way, and on several occasions he fell in consequence of this.

The action was tried by Grantham J. with a jury. The medical evidence shewed that the plaintiff's leg would probably never be in the same condition as before the accident; that, if he would undergo an operation (which he was willing to do), the state of the leg would in all probability be much improved; that there was necessarily some, though but small, risk, attending the operation; and that if it was successful he would still have to be very careful, especially in going up or down a ladder or in moving about among machinery.

The plaintiff had been trained as an engineer, and had passed examinations with great distinction, and had obtained a first-class certificate. His intention was to obtain, if possible, the appointment of a superintending marine engineer. He had good prospects of obtaining such an appointment, because his uncles were the owners of a line of steamships, called the Johnston Line. At the time of the accident the plaintiff was residing with his father, and was employed by him at a salary of 3*l.* a week on some engineering business, in connection with which he was travelling when the accident happened.

The duties of a superintending marine engineer were thus described by one of the witnesses, who was a general engineer and manager of the Millwall Docks :—

"A superintending marine engineer has to examine and design and look after the maintenance and upkeep of engines on board steamers. These engines are placed sometimes in a very awkward position. The engineer has to go through little holes to examine defects in boilers or the machinery, and go up ladders and along scaffolding when it is necessary. A man should be extremely steady in his head, and he should have a very good nerve and all the abilities for getting about which it is possible for a man to have."

Another witness, who was managing director of the East Ferry Road Engineering Works, to which the plaintiff went before the accident to learn drawing, said that the plaintiff was an exceptionably able young man, and competent to take the position of superintending marine engineer if his leg was right,

C. A. 1904

JOHNSTON v. GREAT WESTERN RAILWAY.

but such a position was impossible for a man who was not sure-footed. It was very common for a man holding such a position to receive a salary of from 750*l.* to 1000*l.* a year, and sometimes as much as 1500*l.*

There was evidence that the plaintiff had applied for an appointment as engineer manager at Bangkok at a salary of 45*l.* per month for the first year, and rising afterwards, and that he would have obtained it, but his application was refused on account of his physical condition owing to the accident.

The plaintiff's medical and other expenses caused by the accident, together with his loss of salary, amounted to 450*l.*

At the time of the trial he was temporarily earning 2*l.* 10*s.* a week.

The jury found for the plaintiff with 3000*l.* damages.

The defendants gave notice of motion that the judgment be set aside and a new trial had, on the ground that the judge had misdirected the jury by misstating and not fully explaining to them the effect of the medical evidence, and by omitting to give them accurate direction as to the principle on which to assess compensation in respect of future loss of income, and on the ground that the damages were excessive.

Lawson Walton, K.C., and *Park Goff*, for the defendants. It is submitted that the jury were not instructed by the judge as to the proper measure of damages, and that they assessed the damages on a wrong basis, namely, full compensation for the loss of the possible prospective earnings of the plaintiff.

Rufus Isaacs, K.C., and *Chester Jones*, for the plaintiff. The Court will not grant a new trial on the ground of excessive damages unless they think that, having regard to all the circumstances of the case, the damages are so large that no jury could reasonably have given them: *Praed* v. *Graham*. (1) The plaintiff has been prevented by the accident from undertaking one kind of professional work. He was qualifying himself for the appointment of superintending marine engineer, and had a good prospect of obtaining such an appointment, and the accident has rendered him unfit for that work. Moreover,

(1) 24 Q. B. D. 53.

apart from the loss of his earning capacity, a man is entitled to compensation for the pain and inconvenience which he suffers by reason of an accident, in addition to the expenses which he incurs. Under the circumstances it is submitted that the amount given by the jury was not unreasonable.

[They were stopped by the Court.]

Lawson Walton, K.C., in reply. In the recent case, *Watt* v. *Beauchamp* (1), an action for libel, the Court of Appeal (June 17, 1903) ordered a new trial, unless the plaintiff would consent to the reduction of the damages from 5000*l.* to 1500*l.* In that case Collins M.R. said that the Court of Appeal has always exercised a control over the amount of damages in an action of tort, and has said that the amount must be kept within reasonable limits.

The jury are not entitled to give a plaintiff damages to the full amount of a perfect compensation for the pecuniary injury without taking into account the accidents of life: *Rowley* v. *London and North Western Ry. Co.* (2) They must not give the plaintiff such a sum as, if invested, will produce the income which he would have earned so that he may not have to work at all for his living.

[VAUGHAN WILLIAMS L.J. There does not appear to me to have been any misdirection.]

It is submitted that the judge directed the jury wrongly as to the effect of the evidence. In *Phillips* v. *London and South Western Ry. Co.* (3) Cockburn L.C.J. said: "there can be no doubt of the power of the Court to grant a new trial where in such an action" (i.e., for personal injury) "the damages are excessive."

[VAUGHAN WILLIAMS L.J. There is no question here of vindictive or exemplary damages. You must read the passage to which you refer as qualified by what Cockburn L.C.J. said on p. 408, namely, that if a jury have taken all the proper elements of damage into consideration, "and have awarded what they deemed to be fair and reasonable compensation under all the circumstances of the case, a Court ought not,

(1) Not reported. But vide *In re Beauchamp*, [1904] 1 K. B. 572.

(2) L. R. 8 Ex. 221.

(3) 4 Q. B. D. 406, at p. 409.

C. A. 1904

JOHNSTON v. GREAT WESTERN RAILWAY.

unless under very exceptional circumstances, to disturb their verdict." And that decision was affirmed by the Court of Appeal. (1)]

The jury may have underestimated the probability of the plaintiff's obtaining employment. In *Phillips* v. *London and South Western Ry. Co.* (2) the Court was dealing with a case of inadequate damages. Here the learned judge told the jury that the evidence was conclusive that the plaintiff would not now be able to obtain such an employment as he would have been able to obtain but for the accident. It is submitted that this should have been left to the jury as an open question.

VAUGHAN WILLIAMS L.J. We have endeavoured to give this case every consideration, because it is impossible to ignore the fact that juries are prone to give a plaintiff suing for damages in respect of injuries sustained in a railway accident a larger compensation than justice would permit. Here undoubtedly 3000*l.* does strike one as being somewhat large, and I do not hesitate to say that it is a larger amount than I should myself have given. But it is plain upon the authorities that the mere fact that the verdict is for a larger sum than the judges of the Court of Appeal would have given is not a sufficient reason for granting a new trial. If the only matter brought before the Court is an overestimate of the damages, I take it that the rule laid down by Lord Esher M.R. in *Praed* v. *Graham* (3) is incontrovertible, and, properly understood, it plainly binds us. By "properly understood" I mean that, though *Praed* v. *Graham* (3) is a decision of the Court of Appeal, which binds that Court at the present moment, this consideration does not prevent us from looking at other decisions of the Court of Appeal and construing *Praed* v. *Graham* (3) in the light of those other decisions. But I repeat that, in my judgment, if the only matter which can be urged against the verdict is the overestimate of the damages, then the rule laid down by Lord Esher M.R. should govern our decision, and there is nothing, so far as I can see, in any

(1) 5 Q. B. D. 78.
(2) 4 Q. B. D. 406.
(3) 24 Q. B. D. 53.

other decision of the Court of Appeal which at all impugns what I have just said. Now the rule laid down by Lord Esher M.R. in *Praed* v. *Graham* (1) is thus expressed: "I think that the rule of conduct is as nearly as possible the same as where the Court is asked to set aside a verdict on the ground that it is against the weight of evidence. If the Court, having fully considered the whole of the circumstances of the case, come to this conclusion only, 'We think that the damages are larger than we ourselves should have given, but not so large as that twelve sensible men could not reasonably have given them,' then they ought not to interfere with the verdict." If one looks merely at the alleged overestimate of the damages in the present case, I am not prepared to say that the damages are so large as that twelve sensible men could not reasonably have given them. But, in my judgment, if we look at the decision in *Phillips* v. *London and South Western Ry. Co.* (2), whether at the judgment of Cockburn L.C.J. or at that of James L.J. in the Court of Appeal, it seems to me that it may sometimes be right to order a new trial, although it cannot be said that the damages are so large that twelve sensible men could not reasonably have given them—that is, in a case in which, although the Court cannot come to the conclusion that the damages are perversely large, yet the amount enables the Court to say that the jury must have disregarded a direction as to the measure of damages which they ought to have regarded. In *Phillips* v. *London and South Western Ry. Co.* (2) the damages were impugned, not as being too large, but as being too small; and the suggestion apparently was that the plaintiff, having been so injured that he would be thereby debarred from continuing to earn his livelihood in his profession, the jury, instead of measuring his loss in relation to the amount of his earnings antecedently to the accident, chose to take into consideration the fact that he had a wealthy wife, and was, therefore, not placed in circumstances which made it necessary for him to earn his own livelihood. That was an inference drawn from the circumstances of the case together with the amount of the damages. And I take it that the same

(1) 24 Q. B. D. at p. 55. (2) 4 Q. B. D. 406; 5 Q. B. D. 78.

C. A. 1904

JOHNSTON v. GREAT WESTERN RAILWAY

Vaughan Williams L.J.

rule would apply if the damages, instead of being impugned as being too small, as in *Phillips* v. *London and South Western Ry. Co.* (1), had been impugned as being too large, as in the present case. In either case, I think it is equally true that, if the Court, from the circumstances of the case and the amount of the damages, can draw the inference that the jury must have applied a wrong measure of damage in contravention of the direction of the judge, the Court may order a new trial, although it is not in a position to say that the mere quantum of excess is so large that no reasonable jury could have arrived at such an amount. I would refer to the following passage in the judgment of Cockburn L.C.J. (2): "But we think that a jury cannot be said to take a reasonable view of the case unless they consider and take into account all the heads of damage in respect of which a plaintiff complaining of a personal injury is entitled to compensation. These are the bodily injury sustained; the pain undergone; the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure, or to lessen the amount of injury; the pecuniary loss sustained through inability to attend to a profession or business as to which, again, the injury may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life. If a jury have taken all these elements of damage into consideration, and have awarded what they deemed to be fair and reasonable compensation under all the circumstances of the case, a Court ought not, unless under very exceptional circumstances, to disturb their verdict. But looking to the figures in the present case, it seems to us that the jury must have omitted to take into account some of the heads of damage which were properly involved in the plaintiff's claim." So in the present case, if I could come to the conclusion that, looking at the figures, the jury must have taken into account some head or some measure of damage not properly involved in or applied to the plaintiff's claim, I should say that we ought to order a new trial. The Court of Appeal affirmed the judgment of Cockburn L.C.J.,

(1) 4 Q. B. D. 406; 5 Q. B. D. 78. (2) 4 Q. B. D. at p. 407.

and James L.J. said (1): "We agree that judges have no right to overrule the verdict of a jury as to the amount of damages, merely because they take a different view, and think that if they had been the jury they would have given more or would have given less, still the verdicts of juries as to the amount of damages are subject, and must, for the sake of justice, be subject, to the supervision of a Court of first instance, and if necessary of a Court of Appeal, in this way, that is to say, if in the judgment of the Court the damages are unreasonably large or unreasonably small, then the Court is bound to send the matter for reconsideration by another jury." It seems to me that there is nothing in these words of James L.J. inconsistent with Lord Esher's rule in *Praed* v. *Graham*. (2) The Lord Justice continued: "The Queen's Bench Division came to the conclusion in this case that the amount of the damages was unreasonably small, and for the reasons which were given by the Lord Chief Justice, pointing out certain topics which the jury could not have taken into consideration. I am of opinion, and I believe my colleagues are also of opinion, for the same reasons and upon the same grounds, that the damages are unreasonably small, to what extent, of course, we must not speculate, and have no business to say."

Now, in my opinion, the only way in which the figure of the damages and the circumstances of the present case could prove that the jury in measuring the damages took into consideration topics which they ought not to have taken into consideration, or applied a measure of damage which they ought not to have applied, would be, if we could draw the inference that the amount of the verdict proved that the jury had disregarded the fact to which their attention was called by Grantham J., that the accidents of life and other elements ought to be taken into consideration so as to prevent a jury from giving a plaintiff such a sum as would be simply an investment, enabling him to do nothing to earn his livelihood. Now one could only come to such a conclusion if it could properly be said that no jury, having regard to the evidence, could have put the difference between the prospective earnings

(1) 5 Q. B. D. at p. 85. (2) 24 Q. B. D. 53.

C. A. 1904

JOHNSTON v. GREAT WESTERN RAILWAY.

Vaughan Williams L.J.

of the plaintiff if he had been uninjured and those earnings after his injury at a higher figure than, say, £*x* a year, and then if you found that the amount of the verdict, after deducting all special damage and all damages given for personal pain and suffering, was a sum which equalled or exceeded the sum which would purchase a life annuity for a person of the plaintiff's age equal to the difference to which I have referred. In such a case I think a new trial might be ordered without reference to any perversity of mind of the jury in regard to the quantum. In any case in which you are able to draw the inference that the jury either included a topic which ought not to have been included, or measured the damages by a measure which ought not to have been applied, I think there ought to be a new trial. But I am not prepared to say that that is so in the present case.

It is, no doubt, very difficult in the present case to estimate the damages, but I think that, taking the evidence as a whole, it is not unreasonable to say that the jury were entitled to take into consideration as a material and substantial matter the possibility that the plaintiff would never be able to accept the position of a superintending marine engineer. It is obvious that he was intended for that: at the time of the accident that was the intention of his life. He was just putting a finishing touch to his education, not in respect of the special matter of marine engineering, but in respect of the general knowledge which every engineer ought to have, and he was doing this because, having regard to the interest of his family in shipping, it was reasonably certain that as soon as he was qualified he would obtain such a post; and that he was qualified, and highly qualified, there can be no doubt.

What, then, ought we to do if there is evidence which would justify a jury in coming to a conclusion that it was extremely doubtful whether the plaintiff ever would be able to fill such post? Apparently from the evidence the position of a superintending marine engineer is a well-paid position, some such engineers getting as high a salary as 1500*l.* a year, and many getting from 700*l.* to 1000*l.* Under these circumstances it is extremely difficult to form any positive opinion as to the

amount of the difference in the plaintiff's prospective earnings —the difference between what he would have got if there had been no accident and what he would be able to get since the accident; and I do not see my way, by reason of the amount of the damages or of the evidence, to say that the jury have taken into consideration either topics or a measure of damages which they ought not to have taken into consideration. I cannot say that they have disregarded the rule laid down in *Rowley* v. *London and North Western Ry. Co.* (1), that the jury may not properly assess as damages a sum of money equal to the present price or value of an annuity equal to that income which would probably have been earned by the plaintiff but for the accident.

This being so, I have now only to deal shortly with the suggested misdirection. [The Lord Justice read the passages in the summing-up which were said to have misdirected the jury as to the effect of the evidence, and in particular a passage in which the learned judge said: "There is a loss of 500*l.* a year on what he" (the plaintiff) "is earning already" (that was the 2*l.* 10*s.* a week)—"the difference between what he is able to earn now and what he would have earned but for this accident. Give him such compensation as you think will put him in the position in which he would have been." The Lord Justice continued:—]

If the summing-up had stood there, I should have said there was a clear misdirection, because the plaintiff ought not to be put in the position in which he would have been by making such a calculation as that which the learned judge has referred to, for the jury are bound to take into consideration the chances and accidents of life, and a number of other matters. But the learned judge, in the very next passage, gave the jury a sufficiently plain instruction based on the judgment in *Rowley* v. *London and North Western Ry. Co.* (1), for he said: "There are the accidents of life and other elements which have to be taken into consideration which ought to prevent you giving him such a sum as would be simply an investment for him, and enable him to do nothing. Still he is entitled to a fair sum,

(1) L. R. 8 Ex. 221.

C. A. 1904

JOHNSTON v. GREAT WESTERN RAILWAY.

Vaughan Williams L.J.

considering the position for which he was fitted, and the position in which he is now." I think that direction is accurate and cannot be complained of. "He is not fitted for that for which he has spent the greater part of his life in qualifying himself, and successfully qualifying himself." Having regard to the fact that the jury had the evidence of the experts before them, I do not think they could have misunderstood that last sentence. On the whole, therefore, my judgment is that the application for a new trial must be refused.

STIRLING L.J. I am of the same opinion, and I have really very little to add; but, out of respect to the argument which has been addressed to us, I wish to state very shortly the grounds on which I have arrived at my conclusion. The question is as to the amount of damages to which the plaintiff is entitled by reason of a railway accident. The plaintiff is a young man of twenty-eight, who has been trained for the position of a superintending marine engineer. He has trained himself for that, not merely because engineering is a profession to which he desires to apply himself, but because he had the prospect through his relatives of filling such a post. At the time of the accident he had not obtained that position. He was then only in the employment of his father's firm temporarily, at a salary of 3*l.* a week, and living at home. Then occurred this accident, and after it he made an attempt to obtain employment in connection with some steamers abroad; his application was refused on the ground of his physical condition. The salary attached to that appointment would have been over 500*l.* a year, rising annually. There is ample evidence that he was well qualified to fill that position. That is how matters stood at the time of the trial. But it was said that he might submit to an operation which, if successful, would greatly improve his condition, and he was willing to submit to it. Of course, there is always a certain amount of risk attending any operation, but in the present state of surgical skill, as I read the evidence, the danger in this case would not be great. But what would be the position supposing that the operation was successful? Dr. Pepper,

the plaintiff's principal medical witness, said: "Impossible for him ever to be as good as before the accident" (that is, even if the operation was successful). "I do not think he can or ought to take any place requiring him to go up and down ladders." Now that being the general outline of the case, for I think there is no great difference in the medical opinions, the question is whether the jury have come to a conclusion which we can call in question by reason of their having given a verdict for 3000*l.* Of that sum about 450*l.* is in respect of expenses and loss of income, which at the date of the trial had been already incurred. There remains, therefore, a sum of 2550*l.*, which is the compensation for the prospective loss to this young man in his profession. Looking at all the circumstances, and weighing them, I am unable to come to the conclusion that the jury have either taken into consideration matters which they ought not to have taken into consideration, or that the sum is one which twelve sensible men could not reasonably have awarded. In these circumstances, although I do not think I should myself have come to the same conclusion as to the amount of damages, I do not see my way to interfere with the verdict and judgment.

COZENS-HARDY L.J. I agree.

Application refused.

Solicitors: *R. R. Nelson*; *Leslie Williams & Alder.*

W. L. C.

C. A.
1904
April 19.

[IN THE COURT OF APPEAL.]

HAMILTON *v.* SEAL.

Practice—Costs—New Trial—Costs of Application.

Where an application is made for a new trial and the application is opposed and a new trial is granted, there is no rule of practice that the costs of the application shall abide the event of the new trial, and in the absence of special circumstances the applicant will be allowed the costs of the application.

THIS was an application by the defendant for a new trial in an action tried before Grantham J. and a special jury. The application was made upon the ground of misdirection, in that the judge had interrupted the trial before the defendant's witnesses were called, and had directed the jury to find for the plaintiff. The application was opposed by the plaintiff.

The Court (Vaughan Williams, Stirling, and Cozens-Hardy L.JJ.) having ordered a new trial, a question arose as to the costs of the application.

Scott Fox, K.C. (*Thorn Drury* with him), for the applicant. The defendant asks for the costs of the application. There is no rule of practice that where a new trial is granted the costs of the application shall abide the event of the new trial. The order in *Bray* v. *Ford* (1) was not intended to lay down any such rule.

[VAUGHAN WILLIAMS L.J. referred to the Annual Practice, 1904, p. 548, and to *Jones* v. *Richards.* (2)]

[It was also contended on behalf of the applicant that, even if there was such a general rule as alleged, the applicant was entitled to the costs of the application in the particular circumstances of the case, and reference was made to *Fletcher* v. *London and North Western Ry. Co.* (3)]

Kemp, K.C., and *F. M. Abrahams*, for the respondent. The

(1) [1896] A. C. 44. (2) (1899) 15 Times L. R. 398.
(3) [1892] 1 Q. B. 122.

costs of this application ought to abide the event of the new trial according to the rule stated in the Annual Practice, 1904, p. 548.

VAUGHAN WILLIAMS L.J. We see no reason for departing from the general rule whatever it is, and at the adjournment we will ascertain what the rule is.

VAUGHAN WILLIAMS L.J. (after the mid-day adjournment). We have consulted the other members of the Court, and it seems that in practice the order which was made in *Bray* v. *Ford* (1) has been considered, not as an order laying down a general rule, but as an order made in the circumstances of that particular case. Beyond that it seems that the Court of Appeal, in dealing with these common law cases, has generally dealt with them upon the basis that there is no absolute rule applicable to all cases, but that the Court has a discretion either to give, or to refrain from giving, or to reserve costs. We have to exercise that discretion to-day, and, speaking for myself, although I cannot say now that there is any general rule which is to be applied, I should think that where there is an application for a new trial and the application is opposed and a new trial is granted, the costs of that successful application ought, in the absence of special circumstances, to be borne by those who oppose it. There is no rule to the contrary, and I propose to proceed on that footing. Therefore in this particular case I think that the costs of this application ought to be the applicant's.

STIRLING and COZENS-HARDY L.JJ. concurred.

Solicitors: *Seal & Edgelow; H. Ellis.*

(1) [1896] A. C. 44.

H. B. H.

C. A.
1903
July 23, 24, 27.

[IN THE COURT OF APPEAL.]

BARQUE QUILPUÉ, LIMITED *v.* BROWN. (1)

Shipping—Charterparty—Construction—"Load in Regular Turn"—Option to select Cargo—Detention at Port of Loading—Custom of Port—Unreasonable Delay—Delay by reason of Charterer's Engagements.

The words "in regular turn" in a charterparty primâ facie mean the regular turn of the port of loading.

But it may be shewn, either from the construction of the charterparty itself or by evidence, that the words were intended to have a different meaning.

The charterparty, dated February 6, 1900, of a sailing ship (then at Hamburg) provided that she should proceed to the port of Newcastle, New South Wales, and there "in the usual and customary manner load in regular turn from Brown's Duckenfield Colliery, or any of the collieries the freighters may name," a cargo of coal, which the freighters bound themselves to ship. The coal was to be carried to South America. The charterers were themselves the owners of the Duckenfield Colliery. On April 6, 1900, they sold to purchasers in South America the cargo of Duckenfield coal to be shipped by this ship. The ship arrived at Newcastle on August 3, 1900, and was not berthed for loading until October 6. Her loading was completed on October 9.

By the regulations and custom of the port a loading berth could not be obtained until a loading order from the colliery was lodged.

On the arrival of the vessel a large number of other ships, which were entitled to priority over her, were waiting to load coals from the Duckenfield Colliery, and the charterers were unable to give her a loading order until October 5, when it was lodged and application made to the berthing master for a berth.

On the evidence the Court held that the charterers had not chartered more vessels to load their coal than in the ordinary course of their business.

The purchasers of the coal refused to accept any other kind of coal, though the charterers endeavoured to induce them to do so:—

Held, upon the construction of the charterparty and with reference to the rules and custom of the port, that the words "regular turn" must be taken to mean the regular turn of the colliery:

Held, also, that the shipowners must be taken to have known that the loading of the ship at this port would probably be long delayed, that the charterers had not caused any unreasonable delay, and that they were not liable for the detention of the ship.

Decision of Kennedy J. affirmed.

APPEAL by the plaintiffs from the judgment of Kennedy J. at the trial of the action.

(1) Now reported by special request.

The plaintiffs were the owners of the sailing ship *Quilpué*, of which the defendants were the charterers.

The action was brought to recover damages for the detention of the ship at Newcastle, New South Wales, in August, September, and October, 1900.

The charterparty was dated February 6, 1900, and it was thereby mutually agreed between the plaintiffs, as owners of the ship, which was then at Hamburg, and the defendants, as freighters, that the ship should with all convenient speed proceed to Newcastle, "and there in the usual and customary manner load in regular turn from 'Brown's Duckenfield' Colliery, or any of the collieries the said freighters may name, a full and complete cargo of coals, which the said freighters bind themselves to ship." The coal was to be taken to Valparaiso.

The charterparty provided that the charterers should have the option of cancelling the charterparty if the ship was not ready to load at Newcastle by August 31, 1900.

The defendants were themselves the owners of Brown's Duckenfield Colliery. They on April 6, 1900, sold the cargo of "Brown's Duckenfield" coal to be shipped by the *Quilpué* to purchasers at Valparaiso.

The ship arrived at Newcastle on August 3, 1900, and was berthed for loading on October 6, 1900, and the loading was finished on October 9. The plaintiffs allowed thirty days as a reasonable time for the loading, and claimed damages for thirty-seven days' longer detention, at the rate of 16*l.* 9*s.* per diem, amounting to 608*l.* 13*s.* The plaintiffs alleged that the ship was not loaded by the defendants "in regular turn," and that the delay in loading was caused by matters within the control of the defendants and for which they were responsible, namely, by the defendants' own other engagements.

The following statement of facts is taken in substance from the judgment of Kennedy J.

At or in the neighbourhood of the port of Newcastle there are some nineteen or twenty collieries. None of these collieries could produce an output of more than from 1000 to 1100 tons daily. The value of the coal differed in the different collieries,

C. A. 1903

BARQUE QUILPUÉ, LIMITED v. BROWN.

but two of them, the Wallsend and the Duckenfield, were the more fashionable collieries, at any rate for steam coal, in the estimation of South American buyers, and their coal was consequently in greater demand. The collieries were not in the immediate vicinity of the landing place, and the coals were brought in wagons along a Government railway to a place called The Dyke, which adjoined the loading place. At the loading place there were at the time to which the action related fifteen cranes, by means of which coal was loaded on the vessels.

The port was governed by the regulations of the Railway Commissioners for New South Wales, and they controlled the bringing up of coal to the cranes from the collieries, and made regulations for the use of the cranes and of the railways. There were no means of storage of coal at or near the cranes, but the loading could only be done direct from the collieries and by means of the railway.

By regulation 2 of the port regulations it was provided that "Vessels requiring berths at cranes for the purpose of loading or unloading cargoes shall obtain the same in the order of their arrival in port, provided that they are considered suitable by the berthing master and that the necessary loading orders have been lodged." The coal must be loaded at a certain minimum rate per diem, and if there was any delay a fine was chargeable against the master of the ship. The loading must go on continuously until finished. Steamers had a preference over sailing ships.

Upon the evidence the learned judge found that there was "a well-established and settled practice that the loading of sailing vessels with coal at this port is a loading in turn of their arrival inter se, subject to their being on what I may call colliery turn with the colliery from which they are chartered to receive their coal. A vessel, in other words, according to this regulation, assuming it to be suitable for a vacant berth, gets from the colliery as well as from the port a right to load in order of its arrival compared with other vessels arriving; but it is subject to the coaling order being given from the colliery, as specified by regulation 2, which in effect means

that it takes its turn with vessels from that colliery, and as the colliery must load continuously when it once begins, and the output is such as will only enable any one of the collieries to load one vessel at a time, if there are ten or twenty vessels arriving to be loaded from a particular colliery a vessel may be kept waiting for a considerable time while vessels which are in turn with and get their loading orders from other collieries are loaded in front of it, though they may arrive later."

When the vessel arrived the defendants had twenty-four ships waiting to load Duckenfield coal. Twenty-seven vessels which arrived after the *Quilpué* were, according to the rules and practice of the port, loaded before her, and eleven vessels which arrived before her were loaded after her, all these thirty-eight vessels being chartered for other collieries.

Upon the construction of the words "in regular turn" the learned judge said it was clear that evidence might be adduced to shew what the meaning was. He thought there was no primâ facie reason why it should mean "regular turn of arrival" rather than "regular turn of the colliery." In this case he thought the latter was the more natural meaning, because the words stood in juxtaposition to "from Brown's Duckenfield Colliery," and he thought that "to load in regular turn from a colliery" would primâ facie mean "turn of the colliery." But, whether that were so or not, the learned judge was satisfied by the evidence that "regular turn" was a statement of the invariable practice of the port as regarded sailing vessels of this description, and that this practice was known to and in the contemplation of the parties to the contract. And the learned judge held upon the evidence that the *Quilpué* was loaded in her regular colliery turn. He held, also, that there had been no excessive chartering by the defendants of ships to load from their colliery, and that they had in fact in the year 1900 chartered fewer vessels than in the three previous years. Judgment was accordingly given for the defendants.

Carver, K.C., and *Leck*, for the plaintiffs. The "regular turn" means the order of readiness to load in the port; at any

C. A. 1903

BARQUE QUILPUÉ, LIMITED v. BROWN.

rate, that is the primâ facie meaning: *Lawson* v. *Burness* (1); *Stephens* v. *Macleod & Co.* (2). It is the duty of the charterer to have the cargo ready: *Stephens* v. *Macleod & Co.* (3); *Stephens* v. *Harris & Co.* (4); *Kay* v. *Field* (5); *Grant* v. *Coverdale.* (6) The ship could have obtained a berth according to the regulations of the port much sooner; it was the fault of the charterers that she did not. The fact that there was an unusual demand upon the colliery with which they had contracted does not excuse charterers from not having a cargo ready in due time: *Gardiner* v. *Macfarlane* (7); and the charterers should bear the loss. If while other vessels which the charterers have to discharge are in the way, and according to the regulations of the port another vessel will not be admitted till those vessels are out of the way, the charterers do prevent the shipowner from performing his contract: *Ogmore SS. Co.* v. *Borner.* (8) The charterers must not put any impediment in the way of loading: *Aktieselskabet Inglewood* v. *Millar's Karri and Jarrah Forests, Ld.* (9); *Tillett* v. *Cwm Avon Works Proprietors.* (10) Moreover, the defendants were bound to exercise their option to select a colliery reasonably: *Tharsis Sulphur, &c., Co.* v. *Morel Brothers & Co.* (11); *Dobell & Co.* v. *Green & Co.* (12); *Carlton SS. Co.* v. *Castle Mail Packets Co.* (13)

Scrutton, K.C., and *R. H. Balloch*, for the defendants, were not called upon as to the meaning of "regular turn."

[VAUGHAN WILLIAMS L.J. We wish to hear you on the question whether there was an implied obligation of the defendants to give the plaintiffs a turn within a reasonable time. The defendants had complete control of the colliery.]

The Duckenfield Colliery's engagements were at this time below the average.

(1) (1862) 1 H. & C. 396.
(2) (1891) 19 R. 38.
(3) (1891) 19 R. at p. 45.
(4) (1887) 57 L. J. (Q.B.) 203, 207.
(5) (1882) 10 Q. B. D. 241.
(6) (1884) 9 App. Cas. 470.
(7) (1893) 20 R. 414.
(8) (1901) 6 Com. Cas. 104, 110.
(9) (1903) 8 Com. Cas. 196.
(10) (1886) 2 T. L. R. 675.
(11) [1891] 2 Q. B. 647, 652.
(12) [1900] 1 Q. B. 526.
(13) [1897] 2 Q. B. 485.

[VAUGHAN WILLIAMS L.J. Can the knowledge of that fact be imputed to the plaintiffs?

Carver, K.C., referred to *Ashcroft* v. *Crow Orchard Colliery Co.* (1)]

There are two classes of cases—(1.) where the undertaking is to load by a fixed date; (2.) where there is no fixed number of days for loading, and then the loading must be completed within a reasonable time. In the present case the charter-party provides that the ship is to load in the "regular turn" from the colliery, and the shipowners had notice that there were other engagements of the charterers.

Charterers are not liable to the shipowners for a delay which the latter must be reasonably taken to have contemplated when the contract was entered into: *Harrowing* v. *Dupré*. (2) The charterers are not responsible for delay caused by the regulations of a port: *Watson* v. *Borner*. (3) In *Ogmore SS. Co.* v. *Borner & Co.* (4) the delay was caused by other vessels of the consignees.

This was a sailing ship, not a steamship, and it is impossible to say within two months when a sailing ship will arrive. The defendants' contract is to load in the "regular turn," and it is submitted that they have done so. Such a contract gives notice to the shipowner that the charterer has other engagements, and the fact that the "turn" is longer in coming than was anticipated is no ground of complaint: *Robertson* v. *Jackson*. (5) The defendants did not ship more coal than usual, but the shipping of coal from other collieries had greatly increased. In *Tharsis Sulphur, &c., Co.* v. *Morel Brothers & Co.* (6) it was held that the obligation of charterers to unload did not commence till the vessel was berthed.

The defendants had only made engagements in the usual course of their business, and this they were entitled to do. The purchaser refused to accept a cargo of any coal but Duckenfield, though the defendants endeavoured to induce

(1) (1874) L. R. 9 Q. B. 540.
(2) (1902) 7 Com. Cas. 157, 166.
(3) (1899) 4 Com. Cas. 335; (1900) 5 Com. Cas. 377.
(4) 6 Com. Cas. 104.
(5) (1845) 2 C. B. 412, 428.
(6) [1891] 2 Q. B. 647.

C. A. 1903

BARQUE QUILPUÉ, LIMITED v. BROWN.

him to do so. The charterparty gave the charterers an option to load from other collieries; but this option was for the benefit of the charterers, and they were not bound to consider the convenience of the shipowners: *Tharsis Sulphur, &c., Co.* v. *Morel Brothers & Co.* (1); *Bulman* v. *Fenwick* (2); *Dobell & Co.* v. *Green & Co.* (3) The plaintiffs are in effect asking for a fixed number of lay-days: *Hulthen* v. *Stewart.* (4)

Carver, K.C., in reply. In *Harrowing* v. *Dupré* (5) the charterers were not in fault. In *Bulman* v. *Fenwick* (2) the jury found that the charterers had made a reasonable selection of a port, and the Court held that they were not bound to alter the destination of the vessel by reason of a strike which afterwards took place. *Carlton SS. Co.* v. *Castle Mail Packets Co.* (6) is distinguishable from the present case. The time for selecting the colliery was when the ship arrived, and the charterers were bound to exercise their option reasonably at that time. It is submitted that they did not do this.

VAUGHAN WILLIAMS L.J. Two questions arise in this case. The first is upon the construction of the charterparty, which, so far as is material, runs thus: "The ship shall with all convenient speed proceed to Newcastle, New South Wales, and there, in the usual and customary manner, load in regular turn from Brown's Duckenfield Colliery, or any of the collieries the freighters may name, a full and complete cargo of coals, which the said freighters bind themselves to ship." It was contended for the appellants that "regular turn" means "in the order of the arrival of the ships" one after the other. I do not think that is the meaning of the words here. Cases have been cited which, I take it, shew that primâ facie the words "in regular turn," unless there is something to lead to a different conclusion, mean "in regular port turn"; but none of these cases shew that "in regular turn" cannot mean "in regular colliery turn," as distinguished from "regular port turn." In my judgment, in the present case, the words do refer to "colliery turn" as

(1) [1891] 2 Q. B. 647, 652.
(2) [1894] 1 Q. B. 179.
(3) [1900] 1 Q. B. 526.
(4) (1903) 8 Com. Cas. 297.
(5) 7 Com. Cas. 157.
(6) [1897] 2 Q. B. 485.

distinguished from "port turn." Not only does that seem to me to be the grammatical meaning of the words, but when you look at the condition of the collieries referred to in this charter-party and to the regulations of this particular port, which were perfectly well known to both the parties, the plaintiffs and the defendants, it is hardly possible to avoid the conclusion that both parties must have contemplated that the ship would be loaded in accordance with the "colliery turn."

Looking at regulation 2 of the port regulations, and bearing in mind the fact, as found by Kennedy J., and obviously known to every one concerned in this business, that no one of the collieries could load more than 1100 tons a day, that being the maximum output of each of them, one cannot help coming to the conclusion that the practice at this port necessarily must be governed and controlled by the colliery output. Under those circumstances, I cannot feel the least doubt that Kennedy J. was right in the construction which he put upon these words in the charterparty and in his conclusion as to what must guide one in determining the meaning of "regular turn."

It was suggested that this ship was not in fact loaded in regular turn. The evidence shews that "regular turn" means the regular turn amongst ocean sailing ships, and that being so it is plain that the *Quilpué*, although she was detained for sixty-seven days, did get her "regular turn." It was suggested that she did not get it because of the interposition of some coasting vessels, which carried stiffening coal to other ports. But that point is really disposed of by the finding of Kennedy J. and the reasons given by him in his judgment.

This disposes of the first point. The second point is, that in this contract, as in every other, there is an implied contract by each party that he will not do anything to prevent the other party from performing the contract or to delay him in performing it. I agree that generally such a term is by law imported into every contract, in the same way as you import into every contract a stipulation that the various things which are to be done by the one party or the other are, if no time is specified, to be done within a reasonable time. In each of these cases that may be called an implied contract. It must

C. A. 1903

BARQUE QUILPUÉ, LIMITED v. BROWN.

Vaughan Williams L.J.

not, however, be supposed that the law readily implies any special affirmative contract; I think the law very rarely indeed does or ought to imply such a contract. But the particular stipulation on which the plaintiffs rely is, as far as I know, implied in every contract. It is said that the defendants committed a breach of that implied contract, and prevented the plaintiffs from performing or unduly delayed them in the performance of the contract. This is put in two ways. First the plaintiffs say: "If you had to load a cargo from the Duckenfield Colliery and none other, you prevented us, because you entered into contracts with such a large number of ships to take coal from that colliery at or about the same time as to make it impossible that we should load our ship within a reasonable time, and it does not matter whether you did that after or before the contract with us was entered into, because a man must be taken not only to stipulate that he will not do anything to render the performance of the contract by the other party impossible or to delay its performance unreasonably, but also to warrant that at the time of entering into the contract he had not already done acts which would render the performance of it by the other party impossible or which would unduly delay the performance." Assuming that that is the proper way of stating the implied contract (although I am not sure it is not too wide), I ask, Did the defendants do anything of that sort?

I think we ought in such a case to take into consideration the facts which were in the knowledge of both parties. In *Carlton Steamship Co.* v. *Castle Mail Packets Co.* (1) Rigby L.J., who concurred with the majority of the Court (and the decision was afterwards affirmed by the House of Lords (2)), said (3): "I do not think that a delay which arose from a contingency the probability of which must have been perfectly well known to and contemplated by the shipowners when they entered into the charterparty, can be considered unreasonable." In the present case it is, in my opinion, plain that, at the time when the shipowners entered into this charterparty, under

(1) [1897] 2 Q. B. 485. (2) [1898] A. C. 486.
(3) [1897] 2 Q. B. at p. 494.

which they were to load in "regular turn," meaning thereby the regular colliery turn, they must have known, not only that the charterers would have prior engagements which might delay the colliery turn of this particular ship, but also that a delay of the ship for loading for a number of days—from forty to fifty days—was not impossible or even unusual in loading at this port from the collieries which exclusively supply it. The plaintiffs must have contemplated that there would very probably be such a delay. Under these circumstances, I agree with Kennedy J. that there was nothing unreasonable in the charterers making such a number of engagements for ships to load at this port of Newcastle, even taking the Duckenfield Colliery alone, as resulted in twenty-four ships, which had priority over this particular ship, the *Quilpué*, being waiting for cargoes when she arrived in August.

But I must deal with the other suggestion that, although this might be so, if the only coal which could be loaded was Duckenfield coal, yet here the charterers had the option of loading from any of the other collieries; and it is said that the option to select the coal must be reasonably exercised. I think that the reasonableness (if that is material) must be at the time of the selection of the coal being notified to the ship, which probably was at Newcastle, and not at the time of the sale of the coal, which took place in April, four months previously. Assuming in favour of the plaintiffs that the absolute option to select coal which is in words given to the charterers must be exercised reasonably, as was said by Romer L.J. in his judgment in *Dobell* v. *Green* (1), I can see no evidence that the option was exercised unreasonably. Assuming that, as possibly the charterers might have ascertained by full investigation, the loading might have been effected more quickly from some other colliery, still there is nothing to shew that the selection of Duckenfield coal was unreasonable. The considerations which may operate in the selection, even at the port of Newcastle, are, I think, quite irrespective of the contracts previously entered into by the charterer. It would not be good business if the charterer were placed in such a position that he could not

(1) [1900] 1 Q. B. 526, 534.

C. A. 1903

BARQUE QUILPUÉ, LIMITED v. BROWN.

deal with or sell his cargo until the arrival of the ship at Newcastle.

I think that the judgment of Kennedy J. was right and ought to be affirmed.

ROMER L.J. I am of the same opinion. On the question of construction of the charterparty, I agree that "load in regular turn" from the colliery means "the regular turn of the colliery," as found by Kennedy J. On this point I cannot usefully add anything to what was said by that learned judge or to what has been said by my Lord.

The other points raised by the appellants' counsel depend upon whether the defendants, in selecting this particular colliery at the time when they did select it, or by reason of overcrowding at the port caused by the chartering of other ships by them, can be said to have hindered or delayed the plaintiffs in their performance of the contract. In other words, were the defendants guilty of such unreasonable conduct as to render them liable for the delay in loading which actually occurred? I can only say that the evidence has not satisfied me that Kennedy J. came to a wrong conclusion of fact upon this point. Consequently the appeal must fail.

STIRLING L.J. I am of the same opinion. I find it impossible to differ from the conclusions arrived at by Kennedy J.

Appeal dismissed.

Solicitors: *W. A. Crump & Son; James Neal.*

W. L. C.

[IN THE COURT OF APPEAL.]

C. A.
1903
July 27, 28.

JONES, LIMITED *v.* GREEN & CO. (1)

Shipping—Charterparty—Construction—Obligation of Charterer to have Cargo ready—Time for Loading not fixed—Cargo from Specified Source—Custom of Port—Common Knowledge of Parties—Liability of Charterer for Delay.

On February 14, 1900, a charterparty was entered into between the plaintiffs (shipowners) and the defendants (charterers), which provided that the ship "shall with all possible despatch proceed to such loading berth as freighters may name at Newcastle, New South Wales, and shall there load in the usual and customary manner a full and complete cargo of coals as ordered by charterers," the name of the coal being left blank. The coal was to be carried to South America, and the defendants sold the cargo as "Wallsend" to purchasers there. No time for loading was fixed.

On May 25, 1900, the defendants notified the plaintiffs that the coal was to be "Wallsend," a coal coming from the Wallsend Colliery at Newcastle, which was in greater demand than the coal from other collieries in the neighbourhood. The output from the collieries was limited.

By the custom of the port, which was known to both parties at the time of the contract, a ship could not obtain a loading berth until a coaling order from the particular colliery was lodged with the port authority.

The ship arrived at Newcastle on September 1, 1900. She did not obtain a loading berth till December 15, 1900, the coaling order having been lodged on the previous day:—

Held, that the charterers had fulfilled their obligation when the ship obtained a loading berth in accordance with her proper turn at the colliery, and that they were not liable for the delay:

Held, also, that the defendants had not acted unreasonably in not substituting another coal for Wallsend, their purchasers having declined to accept other coal.

Decision of Kennedy J. affirmed.

The law as stated in Carver's Carriage by Sea, 3rd ed. s. 254, p. 288, approved and adopted.

Gardiner v. *Macfarlane*, (1893) 20 R. 414, and *Ardan Steamship Co.* v. *Weir*, (1904) 41 Sc. L. R. 230, distinguished.

Per Vaughan Williams L.J.: When the source from which a cargo is to come is expressly defined, no time being fixed for loading, there is no

(1) Now reported by special request.

C. A.
1903
JONES, LIMITED
v.
GREEN & Co.

absolute rule that the charterer is bound to have the cargo ready whenever it may be reasonably expected that there will be a berth for the ship if the cargo is ready.

Grant v. *Coverdale*, (1884) 9 App. Cas. 470, distinguished.

APPEAL by the plaintiffs from a decision of Kennedy J.

The action was brought by the owners of the sailing ship *Snowdon* against the charterers, claiming damages for the detention of the ship.

The charterparty, dated February 14, 1900, between the plaintiffs as owners of the ship and the defendants as freighters, provided that the ship should "with all possible despatch proceed to such loading berth as the freighters may name at Newcastle, New South Wales, and after being in a loading berth as ordered, wholly unballasted and ready to load, ... shall there load in the usual and customary manner a full and complete cargo of coals as ordered by the charterers, which they bind themselves to ship." The name of the coals was left blank. The coal was to be carried to South America. The charterers were to have the option of cancelling the charter if the vessel did not arrive at her loading port and was not ready to load on or before August 31, 1900.

The following statement of facts is taken from the judgment of Kennedy J.

On February 20, 1900, the defendants contracted to purchase from the Wallsend Colliery at Newcastle 20,000 tons of Wallsend coal, which was to be loaded at Newcastle in the year 1900 on vessels to be loaded in turn for Wallsend coal. On May 25, 1900, the defendants notified the plaintiffs that the coal to be loaded on the *Snowdon* under the charterparty at Newcastle was Wallsend coal. The defendants had sold to purchasers in South America the cargo of Wallsend coal to be brought by the ship. The vessel arrived at Newcastle on September 1, but the option to cancel was not exercised.

The ship did not obtain a loading berth until December 15, 1900. She did not obtain a loading order from the Wallsend Colliery until December 14.

The defendants had endeavoured, but without success, to

induce their purchasers to accept other coal in lieu of Wallsend.

By the regulations and custom of the port a loading berth could not be obtained until the coaling order had been lodged.

The plaintiffs had entered into another charterparty for the carriage of a cargo of nitrate from South America. The cancelling date of that charterparty was December 15, 1900, and in January, 1901, the charterers cancelled that charterparty.

By this action the plaintiffs claimed damages for the detention of the ship at Newcastle, and also for the loss which they had sustained by the cancellation of the nitrate charterparty.

The regulations and the custom of the port of Newcastle as found by Kennedy J. are stated in the previous case, *Barque Quilpué* v. *Brown*. (1) The charterparties in the two cases were not identical in form, and in the present case, it should be observed, the charterers were not, as in the former case, the owners of the colliery.

Kennedy J. held upon the construction of the charterparty, in conjunction with the regulations and custom of the port, that the contract was to load the ship in her regular turn at the colliery, and that she had in fact been so loaded. The learned judge also held upon the evidence that the custom of the port as to loading was known to the plaintiffs. He also held that the defendants had not acted unreasonably, either in originally selecting Wallsend coal or in refusing to substitute another kind of coal, when they could not induce their purchasers to accept any other.

Judgment was accordingly given for the defendants.

The plaintiffs appealed.

Carver, K.C., and *Leck*, for the plaintiffs. The charterparty says nothing about "regular turn," and it is submitted that the defendants were bound to be ready with a cargo when the ship arrived. The defendants took the risk of the cargo not being ready. The words "as ordered" do not mean that the ship was to wait for a colliery order: they mean as ordered by the charterers. The charterers must not do anything to prevent

(1) Ante, p. 264.

C. A. 1903

JONES, LIMITED v. GREEN & Co.

the ship from getting her turn: *Gardiner* v. *Macfarlane*. (1) It was not reasonable for the charterers when they had an option as to the colliery to select a colliery at which they knew there might be a long delay. They ought to have chosen another colliery at which there would not have been such delay: *Grant* v. *Coverdale* (2); *Kearon* v. *Pearson* (3); *Carlton Steamship Co.* v. *Castle Mail Packets Co.* (4); *In re Richardsons and M. Samuel & Co.* (5); *Ardan Steamship Co.* v. *Weir* (6); *Adams* v. *Royal Mail Steam Packet Co.* (7); *Kay* v. *Field* (8); *Elliott* v. *Lord* (9); *Lilly* v. *Stevenson* (10); *Stephens* v. *Harris* (11); *Bulman* v. *Fenwick* (12); *Dobell* v. *Green*. (13)

Asquith, K.C., and *J. Fox*, for the defendants. The question depends on the construction of the charterparty. The duty of the charterers was to have a cargo in readiness as stipulated by the charterparty. They were not under any obligation to provide the cargo until the vessel had obtained a berth in accordance with the regulations and practice of the port. The ship could not obtain a berth until she had got a colliery order, and the charterers were not responsible for the delay.

The charterers had an option as to the selection of coal, and they were entitled to select Wallsend coal. They did so when they sold the cargo to the purchasers in South America, and the purchasers refused to accept any other coal: *Harris* v. *Dreesman* (14); *Little* v. *Stevenson*. (15) The option was given for the benefit of the charterers: *Tharsis Sulphur, &c., Co.* v. *Morel Brothers & Co.* (16)

The Scotch cases cited are distinguishable.

Carver, K.C., in reply.

VAUGHAN WILLIAMS L.J. read the above-stated clause in the charterparty, and continued:—The plaintiffs' case is that these

(1) 20 R. 414.
(2) 9 App. Cas. 470.
(3) (1861) 7 H. & N. 386.
(4) [1897] 2 Q. B. 485, 491; [1898] A. C. 486.
(5) [1898] 1 Q. B. 261.
(6) 41 Sc. L. R. 230.
(7) (1858) 5 C. B. (N.S.) 492.
(8) (1882) 10 Q. B. D. 241.
(9) (1883) 52 L. J. (P.C.) 23.
(10) (1895) 22 R. 278.
(11) (1887) 57 L. J. (Q.B.) 203.
(12) [1894] 1 Q. B. 179.
(13) [1900] 1 Q. B. 526.
(14) (1854) 23 L. J. (Ex.) 210.
(15) [1896] A. C. 108.
(16) [1891] 2 Q. B. 647, 652.

words constitute an absolute undertaking by the charterers that they will have the cargo of coal ready to put on board when the loading berth has been obtained according to the custom of the port, and it is said that the loading berth might have been obtained at a very much earlier date than in fact it was. The delay was undoubtedly for a very long time, if the charterers had not failed in their duty; and it is said that they did fail in their duty, and that their failure was the cause of the ship being so long in obtaining a berth.

Now I entirely agree that, if the reason of the berth not being given sooner was that the charterers failed in their duty, the appellants would be entitled to succeed. But, in my judgment, that is not so. It is said that the reason of the berth not being obtained was the non-provision of the cargo, and that the charterers were bound to have the cargo ready there, because that was necessary in order to obtain the berth. It seems to me that that argument is covered by the observations of Lord Herschell in *Little* v. *Stevenson*. (1) In that case it was decided that there was no duty of the charterer to have his cargo ready to load on the off-chance of getting a berth. Lord Herschell (2) took the view that, if in ordinary course it might be expected that a berth would be available if the cargo was ready, then if the charterer took upon himself the obligation of having the cargo ready the loss of the berth would be due to his failure in duty. In order to substantiate this duty of the charterer Mr. Carver relied on, amongst other cases, *Grant* v. *Coverdale*. (3) Lord Selborne, who delivered the judgment of the House of Lords, drew a distinction between loading and that which is preliminary to loading, having the cargo there ready to load, and he pointed out that when there are exceptions which relate to the loading they would not relieve the charterers from the obligation to have the cargo there ready to load. The decision is shortly put at p. 474 thus: "With that observation I proceed to notice that it is not denied, and cannot be denied, that unless those words of exception according to their proper construction take this case

(1) [1896] A. C. 108. (2) [1896] A. C. at p. 119.
(3) 9 App. Cas. 470.

C. A. 1903

JONES, LIMITED v. GREEN & Co

Vaughan Williams L.J.

which has happened out of the demurrage clause, the mere fact of frost or any other thing having impeded the performance of that which the charterer and not the shipowner was bound to perform will not absolve him from the consequences of keeping the ship too long. That was decided under circumstances very similar in many respects in the case of *Kearon* v. *Pearson* (1), and decided expressly on the ground, as was pointed out, I think, by all the learned judges, certainly by my noble and learned friend here present (Lord Bramwell), by Wilde B. and Pollock C.B., that there was no contract as to the particular place from which the cargo was to come, no contract as to the particular manner in which it was to be supplied, or how it was to be brought to the place of loading, and that therefore it could not be supposed that the parties were contracting about any such thing."

The present case, as it seems to me, differs entirely from the case with which Lord Selborne was dealing in *Grant* v. *Coverdale*. (2) Here the source from which the coal was to come was expressly defined, and, that being so, it seems to me impossible to lay down an absolute rule that the charterer undertakes an unqualified obligation to have the cargo ready whenever it may be reasonably expected that there will be a berth for the ship if the cargo is ready. This may be so sometimes, but I cannot say that it must necessarily be so.

Now in the present case let us see what was the contract as regards the source of the coal, and what was the knowledge of the parties to the contract. We cannot, I think, exclude the knowledge of the parties, because after all what we have to consider is, what was a reasonable time, whether for the provision of the cargo or for the commencing of the loading. And in determining what is a reasonable time, it seems to me obvious that you must have regard to the circumstances which were known to both parties at the date of the contract, and must have been taken into consideration by both as affording the basis and foundation of the contract. The source of the coal to be loaded is defined by this contract. In the first place, the coal is to be loaded at Newcastle, New South Wales;

(1) 7 H. & N. 386. (2) 9 App. Cas. 470.

secondly, the charterer is to have the right to name the particular colliery from which the coal is to come; thirdly, it was within the knowledge of both parties that the port of Newcastle serves a limited number of collieries adjacent to that port, and serves no other collieries. The whole of the coal which is loaded at Newcastle is the product of these collieries. It was known also to both the parties to the contract that the output of these collieries is very limited, not exceeding 1100 tons a day. It was known also to both parties that, if sailing ships went to this port, the loading would have to be done according to the regulations of the port, and that you could only obtain a loading berth when you had got from the colliery a "loading order"—that is, if the circumstances were such that according to the colliery turn you were entitled to have a loading order. It was also known to both parties that in this state of things sailing ships were undoubtedly kept a very long time before they could, in ordinary course, get their loading order from the colliery. It is in evidence that this very ship, the *Snowdon*, in the previous year had to wait for eighty-three days in order to get her loading order according to the colliery turn. The result is, in my opinion, that we are bound to come to the conclusion that both parties to this contract assumed as the basis of the transaction that there would and must be more or less delay, according to the loading turn at the colliery. Looking at the correspondence, though it is true that it took place after the date of the charterparty, still one cannot help seeing from it that both the charterers and the shipowners were contracting in view of this state of things; and, as time went on and it came to the knowledge of the parties that there was likely to be a long "stem," as it is called in the correspondence, both parties assumed that this long "stem" was a burden which both of them would have to bear, and that neither of them took upon himself the risk of the long "stem," and eventually, when it had become certain that the ship would have to wait a long time, the shipowners wrote to the charterers asking them to try, as a matter of grace, if they could induce the purchasers of the cargo, who had purchased Wallsend, to change it to some other kind of

C. A. 1903

JONES, LIMITED v. GREEN & Co.

Vaughan Williams L.J.

coal, and, although the charterers did their best, they were unable to effect this alteration. It seems to me that all these things to which I have referred clearly bring the present case within the authority of *Harris* v. *Dreesman*. (1) That decision is most admirably summarized in Carver on Carriage by Sea, 3rd ed. s. 254, p. 288. After dealing with what I may call the general duties of the shipowner and the charterer, the learned author continues in s. 254: "On the other hand, the charterer cannot be assumed to have the cargo ready if it is expressly to be provided from a particular place, and the charter has been made in view of circumstances by which, as the parties know, the procuring of a cargo from that place may be delayed. And if in such a case no arrangement is made as to the time in which the loading is to be done, the charterer will be allowed a reasonable time for getting the cargo, having regard to the known sources of delay." It seems to me that the present case falls exactly within that passage. The cargo was to be provided from a particular place. The charter was made in view of circumstances by which, as the parties knew, the procuring of a cargo from that place might be delayed. No arrangement was made as to the time in which the loading was to be done. In these circumstances, in my judgment, the charterers were entitled to a reasonable time for getting the cargo, having regard to the known sources of delay which I have already specified.

What then has the learned judge found? He has found as a fact that there was nothing unreasonably done and nothing left undone which the charterers ought reasonably to have done. The only suggestion made as to what the charterers could have done is that they could have substituted another coal. In my opinion they did all which they could be reasonably expected to do when they did their best to induce their purchasers to accept a different coal instead of Wallsend coal. I will assume that another coal could have been got; but on the authorities which have been cited, and which I do not think I need go into at length, it seems to me that the option which the charterers had to select the particular coal

(1) 23 L. J. (Ex.) 210.

was one which they had a right to exercise for their own benefit, and they had a right to determine what the coal should be, not when the ship arrived in New South Wales, but at any period which they might find commercially convenient after the date of the charterparty.

The observations of Lord Wensleydale (then Parke B.) in *Harris* v. *Dreesman* (1) are extremely pertinent; and, in my opinion, they are summarized with perfect accuracy in the passage which I have read from Mr. Carver's book.

In those circumstances I think that the judgment of Kennedy J. ought to be affirmed, and the appeal dismissed with costs.

ROMER L.J. I am of the same opinion, and will only add a few words. The first point taken for the appellants is that the charterers were bound to have their cargo of coal ready for loading immediately on the arrival of the ship at Newcastle, and that consequently they are liable for the delay in loading which in fact occurred. But in my opinion it is clear that when, according to the option given by the charterparty to the charterers, they selected Wallsend coal, the charterparty became one for the loading of a cargo coming from that special colliery at the port of Newcastle. And I may point out that no special time for the loading was fixed by agreement, and no special provision was made about it.

On the evidence it is clear that both parties knew all the relevant facts connected with the practice of berthing ships at Newcastle for the loading of coal from the collieries there, and I have no hesitation in saying that in my opinion we should not be carrying out the true intention of the parties and the true meaning of this charterparty if we did not hold, as I think we ought to hold, that the parties contracted with reference to that common knowledge. What the practice is as to berthing ships at the port of Newcastle we have already fully dealt with in *Barque Quilpué* v. *Brown* (2), and I need not again state that practice. Both parties, as I have said, knew of it; and this contract must be construed with reference to that common

(1) 23 L. J. (Ex.) 210.

(2) Ante, p. 264.

C. A. 1903

JONES, LIMITED v. GREEN & CO.

Romer L.J.

knowledge. I agree with my Lord as to the statement of the law in that passage of Mr. Carver's book which he has read, and I think the principle as there laid down is true. It is borne out by *Harris* v. *Dreesman* (1), and I think the same principle was adopted in *Little* v. *Stevenson*. (2) Applying that principle to the present case (subject only to the question whether the charterers acted unreasonably in selecting this particular Wallsend Colliery), I think the shipowners cannot complain of the delay in obtaining a loading berth. That delay arose by reason of the practice of the port known to both parties, and intended by them both to be taken into consideration with reference to this contract, and from circumstances which were unavoidable as regards the charterers. It is admitted that after the loading berth was obtained there was no delay on the part of the charterers; and in these circumstances it seems to me impossible to say that the charterers had not got the cargo ready in a reasonable and proper time according to the true meaning of the contract.

The two Scotch cases which have been cited are, I think, clearly not authorities which govern the present case. In *Ardan Steamship Co.* v. *Weir* (3) no common knowledge of the practice of the port was alleged or proved; and *Harris* v. *Dreesman* (1) was not, so far as I can see, even mentioned in the course of the argument. And when the exact questions decided in *Gardiner* v. *Macfarlane* (4) are carefully considered, it will be seen that that case has no bearing upon the question now before us.

That being so, the only other question is, whether, in selecting the Wallsend Colliery, the charterers acted unreasonably. All I need say is that it is not proved to my satisfaction that they did, and I adopt the judgment of Kennedy J. upon this point. In considering questions of this kind, the observations of Bowen L.J. in *Tharsis Sulphur, &c., Co.* v. *Morel Brothers & Co.* (5) should be borne in mind. Dealing with the question whether the option given to a charterer has been properly

(1) 23 L. J. (Ex.) 210.
(2) [1896] A. C. 108.
(3) 41 Sc. L. R. 230.
(4) 20 R. 414.
(5) [1891] 2 Q. B. 647, at p. 652.

exercised in such cases as this, the learned Lord Justice said: "The option is given for the benefit of the person who has to exercise it. He is bound to exercise it in a reasonable time, but is not bound, in exercising it, to consider the benefit or otherwise of the other party." Applying that principle here, I am clearly of opinion that Kennedy J. came to the right conclusion on this question of unreasonableness.

STIRLING L.J. I am of the same opinion, and have only a few words to add.

We have to deal with a charterparty the material stipulations of which are that the ship "shall with all possible despatch proceed to such loading berth as the freighters may name at Newcastle, New South Wales, and after being in a loading berth as ordered, wholly unballasted and ready to load shall there load in the usual and customary manner a full and complete cargo of Wallsend coal as ordered by charterers, which they bind themselves to ship." It was not disputed that under this charterparty the charterers were bound to have a full and complete cargo of coals in readiness whenever the ship was in a loading berth. That duty has been fulfilled, and no question arises about it. But it is contended that the charterers are liable for the delay which occurred before the ship got into the loading berth. As to that, it seems to me that the obligations of the charterers were such as were stated by Lord Herschell with reference to a very similar charterparty in *Little* v. *Stevenson*. (1) He said: "Undoubtedly that would impose by implication upon the charterer the duty of doing any act that was necessary on his part, according to the custom of the port, to enable her to get a berth. He could not defend himself from a complaint of the shipowner that his vessel had been delayed by saying that she was not in a berth, when she was not there because the charterer himself had failed in his duty to do some act on his part to enable her to get there." And he added (2): "I do not for a moment deny that he is bound to do whatever is reasonable on his part, with the view of getting the ship berthed at the earliest period that is

(1) [1896] A. C. 108, at p. 118. (2) [1896] A. C. at p. 119.

C. A. 1903

JONES, LIMITED v. GREEN & Co.

Stirling L.J.

reasonably possible." The question which we have to decide is, whether the charterers omitted to do anything which was reasonable on their part with the view of getting the ship berthed at the earliest period reasonably possible. Having regard to the facts proved, and in particular to the possibility, which was within the knowledge of both parties when the charterparty was entered into, that the obtaining of a cargo at Newcastle might be delayed, I cannot think that the defendants failed in doing anything which was reasonably possible for the purpose of obtaining a berth.

I should like to add, with regard to the Scotch case *Ardan Steamship Co.* v. *Weir* (1), that it appears to me that, although the charterparty was expressed in terms almost identical with those of the present charterparty, the facts established were different. The learned judge (Lord Pearson) found that there was an absolute failure in the duty of the charterer to provide a cargo at the proper time; and, moreover, there was no evidence of that common knowledge (proved in the present case), which, upon the authority of *Harris* v. *Dreesman* (2), ought to be taken into consideration.

I agree, therefore, that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *W. A. Crump & Son; Parker, Garrett & Co.*

(1) 41 Sc. L. R. 230. (2) 23 L. J. (Ex.) 210.

W. L. C.

[IN THE COURT OF APPEAL.]

C. A.
1904
April 12, 13.

MARKS *v.* SAMUEL.

Slander—Actionable Words—Charge of bringing a Blackmailing Action.

An action for slander will lie for spoken words imputing to the plaintiff that he has brought a blackmailing action although no special damage is alleged.

THIS was an application by the plaintiff for a new trial in an action of slander tried before Grantham J. and a special jury.

Both the plaintiff and the defendant were directors of public companies.

By his statement of claim the plaintiff alleged that prior to the matters thereinafter complained of the defendant was indebted to the plaintiff in divers sums of money which he refused to pay, and the plaintiff brought an action to recover the same, and recovered judgment against the defendant in the Mayor's Court, London, for 100*l.* and his costs of suit, and a further sum by virtue of an award made by an arbitrator duly appointed by the said Court of 500*l.* and costs, and also the costs awarded to the plaintiff in the said Court of an unsuccessful attempt made by the defendant to set aside the said judgment and award; and these facts were proved at the trial. The statement of claim then continued as follows:—

"2. On the 30th day of May, 1902, at a meeting of shareholders of the Elandsfontein No. 2 Gold Mining Company, held on such date at the Institute of Accountants, Moorgate Street, E.C., the defendant falsely and maliciously spoke and published of and concerning the plaintiff the following words: 'On that occasion (meaning upon the hearing of certain arbitration proceedings arising out of the said action in the Mayor's Court) Mr. Marks (meaning the plaintiff) was taxed with having brought a blackmailing action (meaning the said action in the Mayor's Court) against me. He was awfully

C. A. 1904

MARKS v. SAMUEL.

indignant about it, and wanted to know if it was by instructions of mine that my counsel accused him (meaning the plaintiff) of having brought a blackmailing action. My counsel said it was upon his (meaning the plaintiff's) own evidence.'

"3. The meaning of the said words was that the plaintiff was a blackmailer, and had brought an unfounded action against the defendant, had been guilty of indictable offence or offences, and of endeavouring to obtain moneys by threats from defendant, and was further guilty of a misdemeanour in supporting his claim by giving false evidence, and had so admitted in his evidence given upon oath before the said Court.

"4. By reason of the said defamatory matter, which was published by divers persons (being the shareholders and press reporters present at the meeting mentioned in the second paragraph hereof), the plaintiff was greatly injured in his business, credit and reputation, and has suffered damage."

The defendant pleaded that the occasion on which the words were spoken was privileged, and that they were spoken bonâ fide and without malice.

In the course of the trial the learned judge intimated that this looked like a case of the pot calling the kettle black, and, after hearing the plaintiff's evidence and his cross-examination, the jury stopped the case and gave a verdict for the defendant, and judgment was entered accordingly.

Bray, *K.C.*, and *P. Rose-Innes*, for the plaintiff. The defendant must justify in some way his repetition of what his counsel said; it is not sufficient for him to say that his counsel did make that statement: *Watkin* v. *Hall*. (1) In bringing the action which was referred to the plaintiff was not acting as a "blackmailer." The result shews that the claim was not unfounded. The learned judge did not properly explain to the jury the issues in the present action.

Rufus Isaacs, *K.C.*, and *A. Neilson*, for the defendant. It is contended that the issues were sufficiently explained to the

(1) (1868) L. R. 3 Q. B. 396.

jury. After hearing the plaintiff's evidence and his cross-examination the jury stopped the case, and it is submitted that they were the tribunal to decide.

But it is also contended (though there was no opportunity of raising this point at the trial) that the action is not maintainable at all. Had this point been raised the learned judge would have been bound so to direct the jury. No special damage was alleged, and the words in question will not bear the innuendo. Even if there has been misdirection by a judge, the Court will not grant a new trial "unless some substantial wrong or miscarriage has been thereby occasioned": Rules of the Supreme Court, Order XXXIX., r. 6. To bring a "blackmailing" action is not a criminal offence, and to say that a man has brought such an action gives rise to no cause of action for slander in the absence of special damage.

[VAUGHAN WILLIAMS L.J. referred to Odgers on Libel, 3rd ed. p. 112, where "blackmailing" is included under the head of "Words obviously defamatory," and it is said "'blackmailing' is clear, and requires no innuendo to support it," and reference is made to *Edsall* v. *Brooks*. (1)]

It is submitted that it can never be a criminal offence to bring any action, however unfounded, unless in a case of conspiracy. In *Cotterell* v. *Jones* (2) it was held that the conspiracy of two persons maliciously and vexatiously and without reasonable or probable cause to bring an action against the plaintiff, in the name of a third person, but for their own benefit, did not, in the absence of an allegation of legal damage to the plaintiff, give the plaintiff any cause of action. Any one has a right to bring any action, however unfounded it may be, though if he supports his action by perjury he commits a criminal offence by reason of the perjury.

[VAUGHAN WILLIAMS L.J. referred to *Wren* v. *Weild*. (3)]

Bray, K.C., in reply. Where it is said that a man has brought a "blackmailing" action any ordinary person hearing the statement would take it to mean that the man was accused of being a "blackmailer." It is submitted that it is actionable

(1) (1864) 2 Robt. 29; (1865) 3 Robt. 284 (New York).

(2) (1851) 11 C. B. 713.

(3) (1869) L. R. 4 Q. B. 730, 734.

C. A. 1904

MARKS v. SAMUEL.

to say that a man is a "blackmailer." If a man says to another, "Pay me 500*l.*; if you do not I will expose you by bringing an action," the threat would be an indictable offence. It was a question for the jury whether the words used would reasonably be understood by those who heard them as meaning that the plaintiff was a "blackmailer": *Hankinson* v. *Bilby*. (1) If the action was won by the plaintiff's evidence the statement must have meant that the plaintiff had committed perjury.

VAUGHAN WILLIAMS L.J. On the whole I think that there must be a new trial. I will deal first with the last point that was made by the defendant's counsel. He, of course, was right in his contention, that unless this statement of claim was one in which the alleged slander imputed or might impute a criminal offence, this action failed because there is no special damage alleged, and it is not a case in which there is any imputation of professional misconduct or misconduct by a tradesman in his trade or anything of that sort. It is just one of those cases in which spoken words are not actionable unless they are spoken words which impute or might impute a crime, that is to say, words which, in the opinion of the tribunal which ultimately deals with the matter, appear to have been not necessarily intended by the speaker to impute a crime, but capable of being understood by the hearers as imputing a crime. Now the words here set forth in paragraph 2 of the statement of claim are these: [The Lord Justice read the paragraph, and continued:—] The next paragraph, paragraph 3, contains the innuendo; but I will say a word upon the matter without any reference to the innuendo at all. I am not prepared to say that even without any innuendo it would be right to say that the words actually used could not be reasonably understood by the hearers as imputing to the plaintiff a criminal offence. I mean by that a criminal offence in making a claim, supporting it by an action, and supporting it in that action by criminal means, that is to say, either by false evidence given by the plaintiff himself, or by false evidence obtained by him for the

(1) (1847) 16 M. & W. 442.

purpose of the action. If there was such an action brought, and thus supported, it seems to me that it would be a blackmailing action, and a blackmailing action brought by such means and in such manner as to constitute an indictable offence. When one comes to look at paragraph 3 and sees what the innuendo is, that paragraph confirms what I have said, because the meaning which it is suggested these words conveyed to the hearers is very much the same as that which I have just stated, and which, as it seems to me, the words might reasonably have been understood to mean by the hearers. The words of the innuendo are as follows : [The Lord Justice read paragraph 3 of the statement of claim, and continued :—] Now, take these last words, " and was guilty of a misdemeanour in supporting his claim by giving false evidence, and had so admitted in his evidence given upon oath before the said Court." I think that the hearers might well have understood that that was the imputation which was being made by the defendant upon the plaintiff, especially when one has regard to the last words complained of—" My counsel said it was upon his own evidence." It certainly suggests there that that evidence was untrue evidence given upon oath by the plaintiff. Therefore, I think that we ought not to refuse a new trial upon the last point taken by the defendant's counsel. [The Lord Justice then dealt with the proceedings at the trial, and came to the conclusion that there ought to be a new trial on the ground that the judge had not explained to the jury what were the issues to be tried.]

STIRLING L.J. I am of the same opinion. In the first place, I think that the point that the action was not maintainable at all cannot be relied on. It is impossible, I think, to come to the conclusion that the words set out in paragraph 2 of the statement of claim were not such as the persons hearing them might fairly interpret as imputing an indictable offence to the plaintiff. If that be so, the action is maintainable, and the question must be asked of the jury as to the meaning which ought to be put upon the words. [The Lord Justice then dealt with the question whether there ought to be a new

C. A. 1904

MARKS v. SAMUEL.

trial, and agreed with the conclusion arrived at by Vaughan Williams L.J.]

COZENS-HARDY L.J. I agree, and have nothing to add.

Application for new trial allowed.

Solicitors: *Morris, Coote & Co.; Dale, Newman & Hood.*

H. B. H.

C. A. 1904 *April* 21.

[IN THE COURT OF APPEAL.]

JOYNT *v.* CYCLE TRADE PUBLISHING COMPANY.

Defamation (Libel)—Fair Comment—Matter of Public Interest—Personal Imputations—New Trial.

If in criticizing the conduct of a man in relation to a matter of public interest the writer goes on to impute to him base and sordid motives, there being no facts to warrant the imputation, the defence of "fair comment" cannot be maintained in an action for libel.

Campbell v. *Spottiswoode*, (1863) 3 B. & S. 769; 32 L. J. (Q.B.) 185, followed.

McQuire v. *Western Morning News Co.*, [1903] 2 K. B. 100, commented on and distinguished.

APPLICATION by the defendants for judgment or a new trial of the action.

The action was for libel.

The plaintiff was a solicitor in Dublin; the defendants were the proprietors and the editor of a trade journal called the *Cycle and Motor Trader*.

The plaintiff had formerly acted as solicitor to some shareholders in actions brought by them against the directors of a company called the Components Tube Company, and at the time of the publication of the libel he was a shareholder in and was acting as solicitor for some shareholders in another company called Osmonds, Limited.

On January 30, 1903, the defendants printed and published in the paper the following paragraph: "Wigs on the green at Dublin. . . . I did not exaggerate the prospect of the trouble that was likely to be created as the result of the attentions of

such notable champions as Messrs. Lewis Stroud, solicitor, London, and Lane Joynt (the plaintiff), solicitor, Dublin. With the aid of proxy votes the scheme was passed, notwithstanding the most strenuous efforts of those professional mouthpieces of recalcitrant shareholders. But it may safely be concluded, judging by past experience, that the ardour of these voluntary champions has not been damped by failure to carry their point, and that *they* will find some other means of pursuing their transparently magnanimous and disinterested crusade, which they have entered upon with such marvellous enthusiasm. It is truly beautiful to contemplate the efforts of these men. I cannot say to what extent Mr. Joynt is defending his personal interests; it may be that he is a large shareholder in the Osmond Company. . . . It may also be recollected that the Components Tube Company agitation, in which certain members of the legal profession interested themselves, proved comparatively barren of concrete benefit to the shareholders who were associated. When it came to settling up it was found that the meat was absorbed by the lawyers, and the shareholders merely got the bones to pick."

The plaintiff alleged that the word "they" (which is in italics in the above) meant himself and Mr. Lewis Stroud, and he alleged that the paragraph meant "that the plaintiff, while posing as a solicitor and shareholder, was in fact a corrupt and dishonest agitator, and when acting as solicitor in the said actions had dishonestly enriched himself without obtaining any substantial or material benefit for his clients, and was a person unworthy of trust or confidence."

The plaintiff alleged that by this libel he had been injured in his credit and reputation, and his reputation in his said calling had been greatly injured and damaged, and he had been held up to public hatred and contempt.

By their defence the defendants admitted that they printed and published to the subscribers to their paper the words above set forth, but the defendants denied that the words were printed and published with any of the meanings alleged, and said that they were incapable of those meanings or of any defamatory or actionable meaning. The defendants said that

C. A. 1904

JOYNT v. CYCLE TRADE PUBLISHING COMPANY.

the words were fair and bonâ fide comment on matters of public interest, namely, the position of shareholders pending the liquidation and reconstruction of the Osmond Company, and litigation arising thereout, and were published by the defendants bonâ fide for the benefit of their subscribers and without any malice towards the plaintiff. And the defendants said that the words commencing "It may also be recollected" down to the end of the paragraph did not relate to the plaintiff at all.

The action was tried by Kennedy J. In summing up to the jury the learned judge said (inter alia): "A man has a right to discuss a matter and comment on it, but he must comment on it fairly, as Lord Herschell said in *Davis* v. *Shepstone*. (1) To sum it up, no doubt very imperfectly, it represents to my mind this—that the comment must be such that a fair mind would use under the circumstances, and it must not misstate facts, because a comment cannot be fair which is built upon facts which are not truly stated, and further, it must not convey imputations of an evil sort, except so far as the facts truly stated warrant the imputation."

The jury found for the plaintiff with 500*l.* damages.

Spencer Bower, K.C., and *Walter Warren*, for the defendants. The learned judge told the jury that the matter was one of public interest and therefore open to comment, but he did not tell them, as it is submitted he should have told them, that the question was, not whether they thought the criticism rational or not, but whether the criticism was honest, however irrational it might be.

[VAUGHAN WILLIAMS L.J. If the jury came to the conclusion that no fair-minded man could have written or published this article, would they not be justified in finding for the plaintiff?]

Yes, if no honest man could have done so.

[VAUGHAN WILLIAMS L.J. Is there no amount of extravagance or irrationality which would be evidence of want of fairness or honesty?]

(1) (1886) 11 App. Cas. 187.

The question, it is submitted, is whether it is honest criticism. The jury should have been told that the question was whether the man was really acting as a critic, not as a libeller—not whether he was exercising his function as a critic rationally or irrationally.

[VAUGHAN WILLIAMS L.J. "Fair comment" cannot justify a defamatory statement which is untrue in fact.]

That is a conclusion at which the jury must arrive before they can find that there was a libel. The jury were not told this.

[VAUGHAN WILLIAMS L.J. Whatever is fair and can be reasonably said of the works of an author or of himself is not actionable, unless under the pretext of criticism his character is attacked: *Macleod* v. *Wakley*. (1)]

There must be fairness as a critic—not fairness in the sense of rationality. In *McQuire* v. *Western Morning News Co.* (2) Collins M.R. said: "the jury have no right to substitute their own opinion of the literary merits of the work for that of the critic, or to try the 'fairness' of the critic by any such standard. 'Fair' in this collocation certainly does not mean that which the ordinary reasonable man, 'the man on the Clapham omnibus,' as Lord Bowen phrased it, the juryman common or special, would think a correct appreciation of the work."

[STIRLING L.J. In that case no personal imputation upon the plaintiff was made.]

The criticism was of a literary work, and in such a case any personal imputation upon the author unconnected with the work would be libellous. But it is entirely different when a man's acts are being criticized; in that case there must necessarily be some personal imputation. What is "fair" and "honest" criticism is shewn by *Merivale* v. *Carson* (3); *Wason* v. *Walter* (4); *Campbell* v. *Spottiswoode* (5); *Odger* v. *Mortimer* (6); *Hunter* v. *Sharpe*. (7)

(1) (1828) 3 C. & P. 311, 313; 33 R. R. 668.
(2) [1903] 2 K. B. 100, at p. 109.
(3) (1887) 20 Q. B. D. 275.
(4) (1868) L. R. 4 Q. B. 73.
(5) 3 B. & S. 769; 32 L. J. (Q.B.) 185.
(6) (1873) 28 L. T. (N.S.) 472.
(7) (1866) 4 F. & F. 983, 1005, 1006.

C. A. 1904

JOYNT v. CYCLE TRADE PUBLISHING COMPANY.

It is submitted that the learned judge did not point out to the jury, as he should have done, that it was not necessary that they should be of the same mind as the defendants—that they might find a verdict for the defendants, even if they were of a contrary mind, if they thought that what they had published was within the limits of "fair" criticism. It was for the jury to say whether the language used was such as no reasonable man acting honestly could have used.

Moreover, it is submitted that the damages are excessive. No actual injury to the plaintiff was proved; it was not shewn that he had lost any clients. And the defendants' paper is a trade journal which is circulated only among subscribers, and is not issued to the public generally.

Duke, K.C., and *H. J. Turrell*, for the plaintiff, were called upon only as to the amount of the damages.

Spencer Bower, K.C., for the defendants, suggested that the damages should be reduced to 300*l.*

Duke, K.C., said that he would accept that sum on behalf of the plaintiff, whose object was to vindicate his character.

VAUGHAN WILLIAMS L.J. In my judgment this motion for a new trial, so far as it is based upon misdirection by the learned judge, is entirely without foundation. It is plain from what Kennedy J. said at the beginning, as well as at the end of his summing-up, that he left it to the jury, and explained to them that it was a question entirely for them, whether they considered the paragraph in question defamatory, and he also asked them the special question whether the words at the end of the paragraph, which spoke of lawyers generally, were intended to apply to the plaintiff. Having regard to what took place at the trial, I think there was ample evidence to justify the conclusion at which the jury arrived.

The only other question is whether the paragraph can be treated as "fair comment." It appears that at the trial the question was not raised whether the matter was one of public interest such as would justify a plea of "fair comment." Speaking for myself, I will not express a positive opinion that it was not such a matter of public interest as to admit of the

defence of "fair comment," but, on the other hand, I doubt whether it was. That being so, I will read a short passage from the summing-up which is said to amount to misdirection. [The Lord Justice read the passage above quoted from the summing-up, and continued :—]

The present case is not one of a criticism of a literary production or a work of art. It is not a case of the criticism of the conduct of a public man. It is a criticism of the conduct of an individual in relation to what is said to have been a trade matter—a matter, therefore, in which all the trade had an interest. It is plain that, when a jury have to deal with such criticism, observations which have been made by learned judges with reference to the criticism of literary productions do not necessarily apply. I am referring to observations such as those made by Collins M.R. in *McQuire* v. *Western Morning News Co.* (1) The Master of the Rolls was there dealing with a case which, whether you look at the actual words of the libel or at the innuendo, was manifestly that of a criticism of a literary production—of a play which had been produced and acted; and, as the Master of the Rolls pointed out, in such a case you cannot say that, because the critic thinks and says that the play is dull, vulgar, and degrading, or any of the other things which were said in the criticism there, the writer is guilty of defamation, because in the opinion of the jury the criticism was not justified. If critics were put in such a position criticism would be an impossibility. But, even in the case of a criticism of a literary production, if the writer goes on to make suggestions and reflections disparaging the character of the author, even as an author, he cannot rely upon the defence of fair comment. As I suggested during the argument, if an author had published a novel, and the critic suggested that the novel was not original, that, although published under the author's name, it was really a piece of plagiarism, a reproduction of a book previously written by some one else, although not well known—a criticism which contained such a suggestion could not be justified under the plea of fair comment, unless facts were proved which made it reasonable to make such

(1) [1903] 2 K. B. 100.

C. A. 1904

JOYNT v. CYCLE TRADE PUBLISHING COMPANY.

Vaughan Williams L.J.

a suggestion. That is the law as I understand it to have been laid down by Crompton J. in *Campbell* v. *Spottiswoode*. (1) The learned judge said (2): "If he (the critic) imputes to the person whom he is criticizing base and sordid motives, which are not warranted by the facts, I cannot think for a moment that because he bonâ fide believes that he is publishing what is true, that is any defence in point of law." In my judgment the jury in the present case were quite right in coming to the conclusion that this criticism included an imputation to the plaintiff of sordid motives—an imputation not warranted by any facts. I need not say more about the authorities which have been cited. In my opinion it is clear law, that, when a criticism, whether of a literary production, or of a trade advertisement, or of a public man includes such an imputation, there being no facts to warrant it, it is open to the jury to find, not only that the publication complained of is libellous, but also that the defence of "fair comment" has no application. The truth is that in such a case that which is called a "criticism" ceases to be a criticism, and becomes a defamatory libel. In my opinion, therefore, the application should be refused. I need not say anything about the amount of the damages, because the plaintiff has very handsomely consented that the damages shall be reduced to 300*l*.

STIRLING and COZENS-HARDY L.JJ. concurred.

Application refused.

Solicitors: *Engall, Davidson & Crane; C. Urquhart Fisher.*

(1) 3 B. & S. 769; 32 L. J. (Q.B.) 185. (2) 32 L. J. (Q.B.) at p. 200.

W. L. C.

[IN THE COURT OF APPEAL.]

C. A.
1904
April 30.

In re JOHN ROBERTS & CO.
Ex parte BONZOLINE MANUFACTURING COMPANY.

Bankruptcy—Discharge of Bankrupt—Conditional Order—Failure to comply with Terms—Modification of Order—"No reasonable Probability" of complying with Terms—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 8, *sub-s.* 2—*Bankruptcy Rules*, *r.* 244.

An application, under the proviso at the end of s. 8, sub-s. 2, of the Bankruptcy Act, 1890, for the modification of the terms of a conditional order of discharge ought to be made by the bankrupt himself, not by the trustee in the bankruptcy.

Upon such an application what the Court has to consider is whether there is "no reasonable probability" of the bankrupt's being able to comply with the terms of the order of discharge.

The fact that the bankrupt has failed to comply with the requirements of rule 244 of the Bankruptcy Rules is not a bar to his making an application for the modification of the conditions imposed by the order of discharge.

APPEAL from an order made by one of the registrars of the London Bankruptcy Court modifying the terms of the order of discharge of John Roberts, a partner in the firm of John Roberts & Co., manufacturers of billiard tables.

John Roberts was a celebrated billiard player and had been at one time known as "the world's champion." He was adjudicated a bankrupt on April 7, 1898.

On April 11, 1900, on the application of the bankrupt, an order of discharge was granted to him.

The order contained a recital to the effect that the facts mentioned in paragraphs (*a*), (*b*), (*c*), (*i*), and (*k*) of sub-s. 3 of s. 8 of the Bankruptcy Act, 1890, had been proved. And it was ordered "that the bankrupt be discharged subject to the following condition, to be fulfilled before his discharge takes effect—viz., he shall before the signing of this order consent to judgment being entered against him in the Queen's Bench Division of the High Court by the trustee for the sum of 1500*l.*, being part of the balance of the debts provable in the

C. A. 1904

JOHN ROBERTS & Co., *In re.* BONZOLINE MANUFACTURING COMPANY, *Ex parte.*

bankruptcy which is not satisfied at the date of this order, and 1*l.* 10*s.* costs of judgment.

"And it is further ordered that such judgment be satisfied by annual payments of 300*l.*, the first year to end on June 1, 1901.

"And it is further ordered that, upon the required consent being given, judgment may be entered against the bankrupt in the Queen's Bench Division for 1500*l.*, together with 1*l.* 10*s.* for the costs of judgment."

The bankrupt gave the required consent, and judgment was entered by the trustee accordingly.

The bankrupt soon afterwards went on a tour in Australia, India, China, and Japan with the view of earning money by his skill in billiard playing, but his tour was not so successful as he had anticipated. He failed to make the first payment of 300*l.* within the year ending June 1, 1901, nor did he within that period file, as required by rule 244, "a statement shewing the particulars of any property or income he may have acquired subsequent to his discharge."

In July, 1902, the bankrupt filed an affidavit giving an account of his receipts and expenditure during the two years ending June 1, 1902.

On July 31, 1902, the bankrupt paid the first instalment of 300*l.* to the trustee. The trustee applied for payment of the second instalment, but the bankrupt failed to pay it. He was in England in July, 1902, but in October, 1902, he went again to India. The trustee made application to the solicitors who had acted for the bankrupt, and ultimately the bankrupt's brother-in-law offered to pay 500*l.* to the trustee in satisfaction of the 1200*l.* which remained due under the judgment.

A meeting of the creditors was summoned by the trustee, and was held on February 19, 1904, and a resolution was then passed to the effect that, subject to the consent of the Court being obtained, the meeting considered that the offer of 500*l.* made on behalf of the bankrupt in satisfaction of the instalments and interest due and to become due on the judgment should be accepted.

The trustee then gave notice of an application to the Court

to sanction the acceptance by him of the offer. In support of the application the trustee made an affidavit in which he said that, so far as he had been able to ascertain, the bankrupt during his absence from England had not been able to earn sufficient to enable him to discharge his obligations under the judgment. The trustee therefore considered that it would be to the advantage of the creditors that the offer of 500*l.* should be accepted.

An affidavit in support of the application was also made by the bankrupt's wife. The bankrupt himself was still in India.

On the hearing of the application the registrar was of opinion that it ought to have been made by the bankrupt himself and not by the trustee, but the registrar consented to treat the application as made by the bankrupt under s. 8, sub-s. 2, of the Bankruptcy Act, 1890, his solicitors being present and willing to act for him. And the registrar ordered that the terms of the order of April 11, 1900, should be modified, and that "the balance of the judgment debt now outstanding be satisfied by payment of the sum of 500*l.*, to be made to the trustee on behalf of the bankrupt within ten days from the date hereof, and that the trustee upon such payment cause satisfaction to be entered to the judgment."

The Bonzoline Company, creditors who had opposed the application to the registrar, appealed from the order.

Ringwood, for the appellants. It is submitted that the onus is on the bankrupt to shew that there is no reasonable probability of his being able to comply with the terms of the order of discharge.

[*E. T. Holloway*, for the trustee. The application to the registrar was made under s. 104 of the Bankruptcy Act, 1883, which provides that "every Court having jurisdiction in bankruptcy under this Act may review, rescind, or vary any order made by it under its bankruptcy jurisdiction."

Muir Mackenzie, for the bankrupt. When s. 28 of the Bankruptcy Act, 1883 (the section corresponding to s. 8 of the Bankruptcy Act, 1890), was in force, it was held by a Divisional Court that when a bankrupt had for ten years endeavoured,

C. A. 1904

JOHN ROBERTS & Co., *In re.* BONZOLINE MANUFACTURING COMPANY, *Ex parte.*

but without success, to comply with the terms of a conditional order of discharge, an unconditional discharge should be granted to him: *In re Durnford.* (1)]

Sect. 104 should be read in conjunction with s. 8 of the Bankruptcy Act, 1890, which shews that an application for modification of the terms of an order of discharge ought to be made by the bankrupt himself.

[*Muir Mackenzie*, for the bankrupt. The registrar held that under the circumstances the application might be treated as made by the bankrupt, and he so treated it. It was supported by the bankrupt's solicitor, and by the affidavit of the bankrupt's wife.

VAUGHAN WILLIAMS L.J. I think that an application under s. 104 for a rehearing can only be made by the person against whom the previous order was made.]

The bankrupt has failed to comply with the requirement of rule 244 that he should "not less than once a year file in the Court a statement shewing the particulars of any property or income he may have acquired subsequent to his discharge."

[VAUGHAN WILLIAMS L.J. The duty there imposed on the bankrupt has no relation to any application made by him to the Court. I agree with the registrar that the trustee's application was misconceived. Its only effect was to shew that the trustee thought the offer made was for the benefit of the creditors. Even if the registrar was wrong in treating the bankrupt as present by his solicitor, still the order for modification was made, and the bankrupt now supports it. This is a rehearing.]

Can a bankrupt who is in default in giving the required information to the trustee be heard to make such an application?

[VAUGHAN WILLIAMS L.J. That default does not prevent the bankrupt from making the application. The only question is whether the order ought to have been made.]

It is submitted that it ought not. The registrar ought to have considered the conduct of the bankrupt, and not merely the interest of the creditors. His duty was to protect the

(1) (1895) 2 Man. 521.

creditors against themselves. No good reason has been shewn for modifying the terms of the order of discharge.

Muir Mackenzie, for the bankrupt. The technical objection could be cured, and it has been cured by the registrar.

[VAUGHAN WILLIAMS L.J. We are of opinion that the application may be treated as made by the bankrupt.]

As to rule 244, the bankrupt has in effect complied with it, as regards the years 1901 and 1902, by the affidavit which he filed in July, 1902. And rule 350 provides that non-compliance with any rule shall not render any proceeding void unless the Court shall so direct. And, independently of that, it is submitted that the Court can exercise its jurisdiction under the proviso to sub-s. 2 of s. 8.

[VAUGHAN WILLIAMS L.J. We do not think that non-compliance with rule 244 operates as an estoppel to the bankrupt, or disqualifies him from making the application.]

The present case is a very exceptional one. The bankrupt's capacity for earning money depends on his manual skill and his eyesight. He has passed middle life, and his earnings are not what they used to be. He cannot make such tours as he has taken "on the cheap." He is no longer the "champion" billiard player; he was beaten in two of the Colonies. It would not be in the interest of the creditors that the conditions should be kept in force. The decision in *In re Durnford* (1) was in a bankruptcy to which the Bankruptcy Act, 1883, applied. Sect. 28 of that Act did not contain the proviso which is to be found in sub-s. 2 of s. 8 of the Bankruptcy Act, 1890. Under that proviso the Court has power, after the expiration of two years from the order of discharge, to modify the terms of it "if the bankrupt shall satisfy the Court that there is no reasonable probability of his being in a position to comply with the terms of" the order.

E. T. Holloway appeared for the trustee.

THE COURT held that he had no locus standi to be heard.

Ringwood, in reply. In *In re Durnford* (1) the bankrupt had endeavoured faithfully to comply with the conditions. He

(1) 2 Man. 521.

C. A. 1904

JOHN ROBERTS & CO., *In re.*

BONZOLINE MANUFACTURING COMPANY, *Ex parte.*

was allowed 200*l.* a year out of his earnings, and had a large family. There will be no hardship on the bankrupt in maintaining the original order; execution on the judgment cannot issue without the leave of the Court.

VAUGHAN WILLIAMS L.J. In my opinion we ought not to interfere with the discretion of the registrar. Sect. 28 of the Bankruptcy Act, 1883, as I understand it, treated the conditions imposed in an order of discharge entirely as a punishment to which the bankrupt was liable by reason of his personal conduct or his conduct of his affairs. The matter has now been dealt with by s. 8 of the Bankruptcy Act, 1890, which has been substituted for s. 28. [The Lord Justice read sub-s. 2 of s. 8, and continued:—]

It seems to me that when such an application as the present one comes before the Court, the Court has already discharged its primary function in limiting the order of discharge with reference to the conduct of the bankrupt, and the first thing which the Court has to consider upon the application is whether there is "no reasonable probability" of the bankrupt's being able to comply with the terms of the order. I do not think the Court is entitled to review the conduct of the bankrupt in not exactly complying with the provisions of the rules, but though he has undoubtedly made default in not rendering the prescribed accounts, the Court is still at liberty to consider whether there is a reasonable probability of the bankrupt's performing the conditions of the order of discharge. After all, those conditions are intended for the benefit of the creditors, and the Court ought not to leave that out of consideration. In my judgment the evidence makes it very doubtful whether this bankrupt, at his time of life, and having regard to his comparative want of success in his tour in the East, will find his billiard playing in years to come so good a source of income as it has been in the past. That is the inference which I draw from the evidence, and I think it is really in the interest of the creditors that this offer of 500*l.* should be accepted, and in my opinion we ought to affirm the order of the registrar.

STIRLING L.J. I have come to the same conclusion. The registrar has already exercised his judicial discretion in granting an order of discharge, subject to the condition that the bankrupt shall consent to judgment being entered up against him for 1500*l.*, to be paid in five annual instalments—of course out of his future earnings. The bankrupt was also subject to the provision of rule 244 as to rendering accounts of his property. The present application may, I think, be properly treated as made by the bankrupt, under the proviso at the end of sub-s. 2 of s. 8, for relief from the conditions imposed by the order of discharge. The bankrupt has already paid the first instalment of 300*l.*, and a proposal has now been made by his brother-in-law to pay 500*l.* to the trustee in satisfaction of the 1200*l.* which remains due upon the judgment, and the creditors have seen fit to pass a resolution in favour of accepting the offer. The only question is whether, the bankrupt not having complied with rule 244, the Court ought to ratify the decision of the creditors. The only thing which the Court has to consider under the proviso is, whether there is "no reasonable probability" of the bankrupt's being able to comply with the terms of the order. There is evidence that the creditors (with one exception) think the proposal a favourable one. No doubt the dissentient creditor has a substantial interest in the matter, but still the majority approve of accepting the offer. The matter has been fully considered by the registrar, and I think this Court should be very loth to depart from his decision.

COZENS-HARDY L.J. I am of the same opinion. I think that this was really an application by the bankrupt. It is not an ordinary application; the case is a very special one. It was clearly contemplated by all the parties that the bankrupt should go on a tour in Australia and elsewhere with the view of earning money by his skill as a billiard player. There has been no such wilful disobedience by him to the conditions of the order of discharge as should induce the Court to refuse the application if, apart from the conduct of the bankrupt, the Court is satisfied that there is no reasonable probability of his being

C. A. 1904

JOHN ROBERTS & Co., *In re.* BONZOLINE MANUFACTURING COMPANY, *Ex parte.*

in a position to comply with the terms of the order. I think the evidence is all one way, and I am not prepared to differ from the conclusion of the registrar. I think his order should be affirmed.

VAUGHAN WILLIAMS L.J. There will be no costs of the appeal. We think that under the circumstances it was reasonable to raise the question. But it was wholly unnecessary for the trustee to appear on the appeal, and no deduction for his costs of the appeal must be made from the 500*l*.

Appeal dismissed.

Solicitors: *Pownall & Co.; Letts Brothers; Roscoe & Hincks.*

W. L. C.

1904
April 29.

FOSTER *v.* GREAT WESTERN RAILWAY COMPANY.

Railway Company—Contract of Carriage—Owner's Risk Note—Construction.

The plaintiff delivered to the defendants goods to be carried to their destination by a particular route upon the terms that the plaintiff, in consideration of his being charged a reduced rate below the defendants' ordinary rate, relieved the defendants "from all liability for (inter alia) delay except upon proof that such delay arose from wilful misconduct on the part of the company's servants." The defendants by mistake carried the goods past the station at which they ought to have been transferred to another train, and, on discovering their mistake and that it was then too late for the goods to be sent back to that station in time to catch that train, forwarded them by another route (which was admitted to be the best alternative) to their destination. In consequence of this, the arrival of the goods at their destination was delayed and the plaintiff suffered damage:—

Held, that the defendants were relieved from responsibility by the terms of the contract.

Mallet v. *Great Eastern Ry. Co.*, [1899] 1 Q. B. 309, distinguished.

APPEAL from the county court of Devonshire holden at Plymouth.

The action was brought for damages for breach of contract of carriage.

1904

FOSTER v. GREAT WESTERN RAILWAY.

On August 18, 1902, the plaintiff sent two packages of fish from Brixham to Jersey by the defendants' line viâ Southampton, and signed a consignment note which was in the following terms:—

"To the Great Western Railway Company.

"Receive and forward the under-mentioned merchandise, to be carried at the reduced rate below the company's ordinary rate; in consideration whereof I agree to relieve the Great Western Railway Company and all other companies or persons over whose lines the merchandise may pass, or in whose possession the same may be during any portion of the transit, from all liability for loss, damage, misdelivery, delay, or detention, except upon proof that such loss, damage, misdelivery, delay, or detention arose from wilful misconduct on the part of the company's servants. . . . This agreement shall be deemed to be separately made with all companies or persons parties to any through rate under which the merchandise is carried."

There are alternative routes from Brixham to Jersey, one by way of Exeter, thence passing over the London and South Western Railway to Southampton, and thence by boat, which was the route which the plaintiff had selected, and the other by boat from Weymouth.

It appeared that the fish in question was not taken out at Exeter, as it ought to have been in order that it might be transferred to a London and South Western Railway Company's truck for carriage to Southampton, but that it was accidentally carried on to Taunton, where the mistake was discovered. It was then too late for it to be sent back to Exeter in time to catch the boat train for Southampton, and it was thought best to send it on to Weymouth in order that it might go to Jersey by the next boat. Instead of arriving in Jersey in the morning by the London and South Western Railway Company's boat, it arrived in the evening by the Great Western Railway Company's boat from Weymouth, and, the weather being very hot, the fish had greatly deteriorated in value, and the plaintiff claimed for this difference.

The county court judge held himself bound by the decision

1904

FOSTER v. GREAT WESTERN RAILWAY.

in *Mallet* v. *Great Eastern Ry. Co.* (1), and gave judgment for the plaintiff.

The defendants appealed.

Schiller (*Cripps*, *K.C.*, with him), for the appellants. *Mallet* v. *Great Eastern Ry. Co.* (1) is not a decision on the same facts as there are here. In that case and in *Sleat* v. *Fagg* (2) the carrier sent the goods by a different route than that contracted for, and they were held liable. Here the goods were sent by the right route, and it was only at Exeter that a mistake occurred. It must be admitted that if the defendants, when they discovered the mistake at Taunton, had either allowed the fish to remain there or had sent it back to Exeter, thus causing further delay, they would have been protected by the terms of the consignment note. It is merely because they did their best for the fish by sending it on viâ Weymouth that it is attempted to hold them liable. [He referred to *Morritt* v. *North Eastern Ry. Co.* (3); *Millen* v. *Brasch* (4); *Stevens* v. *Great Western Ry. Co.* (5)]

Duke, *K.C.* (*Hawke* with him), for the respondent. *Morritt* v. *North Eastern Ry. Co.* (3) and *Millen* v. *Brasch* (4) are cases under the Carriers Act, and do not apply here. This case turns on the construction of the terms of the consignment note, which is the same as that in *Mallet* v. *Great Eastern Ry. Co.* (1), which cannot be distinguished from the present case. There, as here, the injury to the goods occurred in consequence of their being sent by a route other than that contracted for. The consignment note only exempts from liability "during any portion of the transit," and the goods were not on the contemplated transit when the damage to them occurred. Negligence which takes the goods on a wrong journey is not within the provisions of the consignment note.

LORD ALVERSTONE C.J. In my opinion the learned county court judge ought to have acted upon that which he un-

(1) [1899] 1 Q. B. 309.
(2) (1822) 5 B. & A. 342; 24 R. R. 407.
(3) (1876) 1 Q. B. D. 302.
(4) (1882) 10 Q. B. D. 142.
(5) (1885) 52 L. T. 324.

doubtedly felt to be the true view of the law; possibly, he may have felt more bound by the decision in *Mallet* v. *Great Eastern Ry. Co.* (1), or by what appeared to him to be the principle involved in that case, than we are. So far as *Mallet's Case* (1) is concerned, with very great respect to Day and Lawrance JJ., I think the extent of the authority of that case, if it is supposed to lay down a principle that the condition cannot apply if the damage happens or the injury to the goods happens upon some part of the route not contemplated by the parties at the time the condition was signed, may require further consideration. I do not wish to say more than this. Certainly, in so far as it lays down any principle which would involve its application to the case before us, I think that it is at variance with more than one decision of co-ordinate jurisdiction, and particularly with the decisions which have held that misdelivery to a wrong person will not render the company liable in the absence of facts which make the condition inapplicable, as, for instance, wilful misconduct. Here the misdelivery happened upon a route that was contemplated by the parties. The question whether *Mallet's Case* (1) can be supported upon the ground that it refers to a particular case of an injury occurring upon a route which never formed the basis of the contract does not arise in this case. Here the Great Western Railway Company undertook to carry from Brixham to Jersey by way of Southampton, which meant that they were to hand over the goods to the South Western Railway Company at Exeter. They by some mistake, and from causes which do not prevent the condition being applicable, carried the goods on to Taunton, and therefore the breach of contract, in my opinion, occurred on the very route contemplated, namely, at Exeter. What happened afterwards? As I have said, if in any way it could be contended that there was a new route then set up as between the parties to which the condition did not apply, I could understand it. But it is agreed that the defendants, finding out their mistake at Taunton, instead of sending the fish back to Exeter and so on to Southampton—which they could have done: in which case there would have

(1) [1899] 1 Q. B. 309.

1904

FOSTER v. GREAT WESTERN RAILWAY.

Lord Alverstone C.J.

been more delay, and the fish would have been spoilt—endeavoured to do the best they could for the plaintiff by sending the fish to Weymouth to be forwarded by the next steamer. It seems to me to be very dangerous to hold that the defendants are liable in this case, in which they did their best to minimise the damage, if they would have been protected had they adopted a course which would have caused more delay and greater risk of damage. It would prevent the defendants who had broken the contract from doing the best they could to save damage to the goods, and possibly to prevent damage altogether. Therefore, I think their action in sending the fish to Weymouth when they found they had made a mistake was not sending it by a fresh route in the sense of *Mallet's Case* (1), but that they adopted a reasonable course, and endeavoured on finding out their mistake to do their best to get the goods to their destination as speedily as possible. That brings us back to the question whether this condition protects them in the case of an erroneous carrying on from Exeter to Taunton instead of delivering to the South Western Railway Company at Exeter. That really, I think, cannot be decided against the railway company without overruling the cases which have decided that under such conditions as these they are protected from the consequences of misdelivery. I therefore think that the learned county court judge was not bound by *Mallet's Case* (1) to the extent which he thought he was, and that he should have followed the principle which he was disposed to follow. I only wish to say that, while I do not think the Carriers Act cases are what may be called authorities, because there different considerations apply, the principle of those cases is applicable to shew that this condition does protect the defendants. I think, therefore, that the appeal must be allowed.

WILLS J. I am of the same opinion. As to *Mallet's Case* (1), if the circumstances were exactly the same we should be bound to follow it. But they are not exactly the same, and therefore it is not an authority which covers the exact facts of

(1) [1899] 1 Q. B. 309.

this case. Now, dealing with the case apart from *Mallet's Case* (1), it seems to me the construction which Mr. Duke sought to put upon the words of the contract was a very forced one. I think when the contract says, "I agree to relieve the Great Western Railway Company and all other companies over whose lines the merchandise may pass, or in whose possession the same may be during any portion of the transit," the words "in whose possession the same may be during any portion of the transit" are used to describe and to particularize the companies which are entitled to protection. I illustrate what I mean by saying this—that if, instead of doing what they did, the company had sent the fish by the Midland Railway, we will say, to Birmingham, or anywhere else, that company whose line was not designed to be an original part of the transit would not be protected by this condition. But I think that the condition, as applied to this case, means that the Great Western Railway Company and the South Western Railway Company should be entitled to its benefit. Now, what is the contract? It relieves the companies from all liability for loss or damage, unless it is proved that such loss arose from wilful neglect on the part of the company's servants. What really happened was that, without any wilful neglect on the part of the defendants' servants, a mistake was made at Exeter upon the line of the original contracting party, and in consequence of that mistake the goods went away on to another portion of their line, and were spoilt. It seems to me that that is directly within the terms under which the protection is sought to be obtained.

KENNEDY J. I am of the same opinion. With regard to the case of *Mallet* v. *Great Eastern Ry. Co.* (1), speaking solely for myself of course, I should desire to reserve any question about that case or its correctness. It seems to me that very different considerations apply to this case and to that. Those considerations sufficiently appear by the head-note, which is obviously correct, that in that case it was in consequence of the railway company's having sent the goods by a different

(1) [1899] 1 Q. B. 309.

1904

FOSTER v. GREAT WESTERN RAILWAY.

Kennedy J.

route to that agreed upon that the damage arose. Here the damage arose by reason of an error committed on the contract route. The subsequent sending the goods off the route, so far from increasing was intended to diminish, and would tend to diminish, the mischief which had happened owing to the mistake that had occurred while the goods were in transit on the contract journey. That seems to me to be a sufficient distinction. The learned county court judge has evidently from his judgment felt himself so much pressed by this case of *Mallet* v. *Great Eastern Ry. Co.* (1) that, against his own view, he decided in the way he did. But it seems to me there is a difference between the case of a carrier who pleads the protection of a contract applying to conveyance by a specified route where he has from negligence not sent the goods by that route at all, and this case, where they were duly and correctly despatched by the route contracted for. Unfortunately, when the goods got to Exeter, which is on that route, they were not transferred into the Southampton train, but were carried on to Taunton. No doubt in *Mallet's Case* (1) the goods were carried for some way over the same line of rails that they would have passed over if they had been duly sent off by the route agreed upon; but the intention in so carrying them was that the goods should travel, not by the route agreed upon, but by another route. It seems to me that there is a great difference between the two cases. I think that the judgment which my Lord and my brother Wills have delivered is perfectly right.

Appeal allowed.

Solicitor for appellants: *R. R. Nelson.*

Solicitors for respondent: *Church, Rendell & Co., for Watts, Ward & Anthony, Exeter.*

(1) [1899] 1 Q. B. 309.

A. P. P. K.

ASHTON *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

1904
May 2.

Railway—Contract of Carriage—Passenger—Right to break Journey.

A contract by a railway company to carry a passenger from one station to another does not in the absence of special terms entitle the passenger to break the journey at any intermediate station.

APPEAL from the registrar of the county court of Lancashire holden at Chorley.

The action was brought to recover the sum of 11½*d.*, paid by the plaintiff to the defendants under protest in the following circumstances.

On September 15, 1903, the plaintiff travelled from Chorley to Manchester on the defendants' railway, having taken at Chorley a return ticket to Manchester available for seven days. On the same day she started back from Manchester by a train which went as far as Bolton on the way to Chorley, but diverged at Bolton and went on to Blackburn. No question was raised as to the plaintiff's right to travel by this train as far as Bolton. At Bolton she alighted. Half an hour afterwards a train was due to leave Bolton for Chorley, but the plaintiff, being minded to pay a visit in the town of Bolton, did not go on to Chorley by that train, but proceeded to leave the station for the purpose of going into the town. Whilst she was in the act of leaving the station, she was required by a ticket collector to give up her return ticket. The plaintiff continued her journey to Chorley by a later train on the same day, but before leaving Bolton Station she was obliged to purchase a ticket from Bolton to Chorley at the cost of 11½*d.*, which sum she claimed to recover in this action.

The registrar gave judgment for the plaintiff. The defendants appealed.

C. A. Russell, K.C. (*Openshaw* with him), for the defendants. A ticket entitling a passenger to travel from one station to another on a railway confers leave only to travel by one

1904

ASHTON v. LANCASHIRE AND YORKSHIRE RAILWAY.

transitus. Apart from special terms, passengers have no right to deviate or to break the journey. The question what constitutes a break in the journey is to a large extent a question of fact. It is not contended that a passenger may not alight from a railway carriage to obtain refreshments; but on the other hand he has no right to terminate contractual relations with the railway company and resume them again at his will and pleasure.

Arthur Powell, K.C. (*Woodfin* with him), for the plaintiff. The contract of the company is to allow the passenger to travel over their railway from one station to another. There is nothing in this case to designate the particular train or to limit the number of trains by which the plaintiff might travel. The defendants contracted to carry her back from Manchester to Chorley, and, having refused to do so except upon payment of the sum claimed, they must refund it.

Counsel for the defendants were not called upon to reply.

LORD ALVERSTONE C.J. This is not a question of the right of a passenger to leave the railway company's premises while waiting for a train in which to continue his journey. The plaintiff seeks to impose on the defendants the duty of carrying her by two separate transits. That duty would involve a right in the plaintiff to leave the defendants' premises, terminating all contractual relations for the time, and then to recommence contractual relations without the consent of the other party to the contract. We must apply our common knowledge of the ordinary incidents of railway travelling. Everybody knows what is meant by breaking a journey. Tickets are sometimes issued by railway companies with special terms enabling the passenger to break the journey at certain stations—that is, to leave the company's premises, and then to return and resume the journey under the same contract. Counsel for the plaintiff contend that this is the common incident of every railway journey; that a return ticket from Chorley to Manchester and back implies a contract by the railway company, not only to carry the holder of the ticket from Chorley to Manchester and back, but also, if the train stops at any station

between the termini and the passenger is minded to leave the railway, to permit him to do so and to return and resume the journey when he pleases, and so to travel between the two termini by a series of journeys instead of one journey. I can see no ground for suggesting that that is the contract of the company. According to the common understanding the contract of the defendants was to carry the plaintiff from Chorley to Manchester and back by one continuous contractual operation, not to perform that operation piecemeal by enabling the plaintiff to enter into a series of contractual relations from hour to hour, or day to day, as and when she pleased.

This appeal must therefore be allowed.

KENNEDY J. I am of the same opinion. The plaintiff's contention, if sound, would convert one single contract to carry a passenger from London to Liverpool into a series of separate contracts to carry from London to the first intermediate station, and so from each intermediate station to the next, and then from the last intermediate station to Liverpool.

Appeal allowed.

Solicitors for appellants: *Woodcock, Ryland & Parker, for C. Moorehouse, Manchester.*

Solicitor for respondent: *William Buttle, for John Whitfield, Chorley.*

F. O. R.

1904
May 3.

HAGMAIER, APPELLANT *v.* WILLESDEN OVERSEERS, RESPONDENTS.

Justices—Special Petty Sessions—Review of Jury Lists—Power to state a Case—Summary Jurisdiction Act, 1879 (42 & 43 *Vict.* c. 49), s. 33—"*Court of Summary Jurisdiction*"—*Interpretation Act*, 1889 (52 & 53 *Vict.* c. 63), s. 13, *sub-s.* 11.

Justices sitting at special petty sessions, as provided by s. 10 of the Juries Act, 1825, for the purpose of reviewing the lists of persons liable to serve on juries, are not a Court of summary jurisdiction as defined by s. 13, sub-s. 11, of the Interpretation Act, 1889, and have, therefore, no power to state a special case under s. 33 of the Summary Jurisdiction Act, 1879.

CASE stated by justices sitting and acting at a special petty sessions in and for the division of Willesden, in the county of Middlesex, for the purpose of reviewing and allowing the lists of persons liable to serve on juries in and for the county.

The case was stated at the instance of the appellant to raise the question whether a veterinary surgeon is exempt from service on juries, but the case as stated was subject to the decision of the Court on a preliminary question, namely, whether, in the circumstances, the justices had any power to state a case.

The following were the reasons which, in the opinion of the justices, rendered it doubtful whether they had power to state a case:—

(1.) There was no hearing of an "information or complaint" as required by s. 2 of the Summary Jurisdiction Act, 1857.

(2.) The justices were not a "Court of summary jurisdiction" within s. 33 of the Summary Jurisdiction Act, 1879, which empowers "any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a Court of summary jurisdiction, on the ground that it is erroneous in point of law," to apply to the Court to state a special case.

The Interpretation Act, 1889, s. 13, sub-s. 11, enacts as follows: "The expression 'Court of summary jurisdiction'

shall mean any justice or justices of the peace, or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is authorized to act under, the Summary Jurisdiction Acts, whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts, or any of them, or under any other Act, or by virtue of his commission, or under the common law."

The justices conceived that this definition must be governed by the words "to whom jurisdiction is given by, or who is authorized to act under, the Summary Jurisdiction Acts"; otherwise the words at the end of the section would mean justices acting in any capacity whatever.

The jurisdiction of the justices in this matter was not given to them under the Summary Jurisdiction Acts, but under special Acts relating to jurors. They could only sit in special petty sessions within the last seven days of September (the Juries Act, 1825 (6 Geo. 4, c. 50), s. 10), with an adjournment thereof within another seven days (25 & 26 Vict. c. 107, s. 8).

It had been held that justices sitting in special sessions for licensing were not a Court of summary jurisdiction: *Boulter* v. *Kent Justices* (1); nor in special sessions for granting game licences: *Reg.* v. *Bird.* (2)

Morton Smith, for the appellant. Justices sitting in special petty sessions for the purposes of s. 10 of the Juries Act, 1825, are a Court of summary jurisdiction, and, therefore, under s. 33 of the Summary Jurisdiction Act, 1879, they have power to state a case. The expression "Court of summary jurisdiction" is defined by s. 13, sub-s. 11, of the Interpretation Act, 1889, to include justices acting under the Summary Jurisdiction Acts "or any other Act." That definition is an extension of the definition in s. 50 of the Act of 1879, and is wide enough to cover justices in special petty sessions exercising their jurisdiction under the Juries Act, 1825; they are also a "petty sessional Court" within sub-s. 12 of s. 13 of the Interpretation Act, 1889, and on that ground also are a Court of summary jurisdiction. The cases relied on by the justices are not in

(1) [1897] A. C. 556. (2) (1898) 62 J. P. 309.

1904

HAGMAIER v. WILLESDEN OVERSEERS.

point. In *Boulter* v. *Kent Justices* (1) the question was whether justices at a licensing meeting are a Court of summary jurisdiction, and it was held that, having regard to the nature of their functions under the Licensing Acts, they were not a Court at all. In *Reg.* v. *Bird* (2) the justices were sitting to grant licences to deal in game, and the case came before the Court on an application for a mandamus to the justices. The question whether they were a Court of summary jurisdiction was neither argued nor decided. In *Re an Application by William Bethel* (3) it was held that justices acting under s. 299 of the Lunacy Act, 1899, are not a Court of summary jurisdiction; but that was upon the ground that there is express provision in the Summary Jurisdiction Acts that those Acts shall not apply to justices when acting under the Lunacy Act. On the other hand, *Fourth City Mutual Building Society* v. *Churchwardens of East Ham* (4) supports the appellant's contention, because it was there held that justices when sitting to issue a distress warrant for the non-payment of rates are a Court of summary jurisdiction within s. 13, sub-s. 11, of the Interpretation Act, 1889.

The respondents did not appear.

LORD ALVERSTONE C.J. The question raised by the justices in this case is whether justices sitting in special petty sessions for the purpose of revising and allowing the lists of persons liable to serve on juries in the exercise of the jurisdiction conferred upon them by s. 10 of the Juries Act, 1825, have power to state a case for the opinion of this Court. The power of justices to state a case is now governed by s. 33 of the Summary Jurisdiction Act, 1879, which provides that "any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a Court of summary jurisdiction on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the Court to state a special case." The language of that section is wider than that of s. 3 of the Summary Jurisdiction Act, 1857, which only

(1) [1897] A. C. 556.
(2) 62 J. P. 309.
(3) (1899) 63 J. P. 453.
(4) [1892] 1 Q. B. 661.

dealt with the determination of "any information or complaint." But in order to bring this case within s. 33 of the Act of 1879, it is necessary that the justices should be acting as a "Court of summary jurisdiction." In order to make that out, counsel for the appellant relies on s. 13, sub-s. 11, of the Interpretation Act, 1889, which provides that "The expression 'Court of summary jurisdiction' shall mean any justice or justices of the peace or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is authorized to act under, the Summary Jurisdiction Acts whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts, or any of them, or under any other Act, or by virtue of his commission, or under the common law." I think that the meaning of that section is that justices are acting as a Court of summary jurisdiction when they are exercising a jurisdiction similar to that conferred by the Summary Jurisdiction Acts, although in fact their jurisdiction in the particular case is derived, not from these Acts, but from some other Act or from the common law. The question we have to consider is whether justices sitting in special petty sessions under s. 10 of the Juries Act, 1825, are a Court of summary jurisdiction within s. 13, sub-s. 11, of the Interpretation Act, 1889. That question cannot be answered by saying that they are a Court of petty sessions. I agree that Courts of petty sessions may have powers under the Summary Jurisdiction Acts and may act under those Acts; but Courts of petty sessions were perfectly well known at the time of the passing of the Interpretation Act, and, indeed, sub-s. 12 of s. 13 deals with the petty sessional Courts and refers to them as being Courts of summary jurisdiction consisting of two or more justices sitting in a petty sessional court-house. If it had been intended to provide by the Summary Jurisdiction Act, 1879, that all justices sitting in petty sessions should have power to state a case, one would have expected to find very different language from that used in s. 33. When one comes to consider the object and purview of s. 10 of the Juries Act, 1825, it seems to me that the class of jurisdiction exercised by the justices under that section is not a jurisdiction which can be

1904

HAGMAIER v. WILLESDEN OVERSEERS.

Lord Alverstone C.J.

rightly described as being under the Summary Jurisdiction Acts or under other Acts conferring similar powers. Under s. 10 the overseers have to produce the jury lists which they have prepared, and to answer such questions as the justices shall put to them; and if any man not qualified or liable to serve is inserted in the list the justices may strike out his name, and so on. It seems to me that that is a class of jurisdiction which cannot aptly be described as the proceedings of a Court of summary jurisdiction. I think it more nearly resembles the proceedings of a public authority, who are allowed to act on their own knowledge without being bound and fettered by the ordinary rules of evidence; and, in my opinion, the provisions of s. 33 of the Act of 1879 are not sufficient to justify us in holding that justices, when acting under s. 10 of the Juries Act, 1825, are a Court of summary jurisdiction with power to state a special case.

I think, therefore, that the objection raised by the magistrates is one to which we must give effect, and that we cannot entertain this case.

WILLS J. I am of the same opinion. I only wish to add that the expression "petty sessional Court," as used in s. 13, sub-s. 12, of the Interpretation Act, 1889, is a comparatively modern phrase. I very much doubt whether it could be found in any Act passed more than fifty years ago, although the expressions "petty sessions" or "special petty sessions" are to be found in many old Acts; for example, in this Juries Act, 1825, the expression "special petty sessions" occurs. I cannot help thinking that if it had been intended by the Interpretation Act to include special petty sessions within the definition of a Court of summary jurisdiction, the Act would have said so in so many words. I think, however, that there is a reason for the distinction. "Petty sessional Court" being a phrase of modern origin, I think that in all probability it will be found that it is never used unless the tribunal or meeting of justices to which it is applied is really exercising judicial powers and functions; and, therefore, there may be a very good reason for saying that wherever the term "petty sessional Court" is

used, the phrase shall mean and shall involve that the tribunal is a Court of summary jurisdiction; whereas it would be a very considerable extension of existing notions upon the subject to bring all meetings of justices in petty sessions into the same category and say that they are all to be considered as having the same powers as a Court of summary jurisdiction, including, of course, the power to state a case. If the Juries Act, 1825, instead of saying "special petty sessions," had provided that the justices should hold a "petty sessional Court," it would have been clear that the Interpretation Act would have made them a Court of summary jurisdiction. I am quite confident that in 1825 the expression "petty sessional Court" was never used.

KENNEDY J. I concur in the judgment of my Lord.

Case struck out.

Solicitor for appellant: *G. Thatcher.*

F. O. R.

1904
April 22;
May 9.

RAINBOW *v.* HOWKINS.

Auctioneer—Personal Liability—Implied Authority to sell without Reserve—Limitation of Authority not communicated to Buyer—Liability of Principal.

The defendant, an auctioneer, was instructed by the owner of a pony to sell it at a public auction with a reserve price of 25*l.* When the pony was put up at the sale the name of the vendor was disclosed; but the defendant inadvertently stated that the sale was without reserve. The pony was knocked down to the plaintiff for fifteen guineas. The defendant immediately afterwards discovered his error, and thereupon put the pony up for sale again, when it was bought in for seventeen guineas. No note or memorandum of the sale to the plaintiff was made. The plaintiff brought an action against the defendant claiming (1.) delivery of the pony, or damages for its detention; (2.) alternatively, damages for breach of warranty of authority by the defendant:—

Held, as to (1.), that the action failed by reason of the absence of a written memorandum of the sale:

Held, as to (2.), that an auctioneer has an implied authority to sell without reserve, and, if he does so, the vendor cannot set up as against the buyer a limitation of that authority not made known to the buyer. There was, therefore, in the circumstances a contract binding on the vendor on which he could (but for the absence of a written memorandum) have been successfully sued by the plaintiff; and there had been no breach of warranty of authority by the defendant.

Warlow v. *Harrison*, (1859) 1 E. & E. 309, distinguished.

Quære, whether the plaintiff had a cause of action against the defendant for failing to make a written memorandum of the sale.

Woolfe v. *Horne*, (1877) 2 Q. B. D. 355, is an authority that an action for wrongful refusal to deliver a chattel sold at public auction may in some circumstances be brought against the auctioneer, although the principal's name has been disclosed to the buyer at the time of the sale.

Appeal of the plaintiff from a decision of the judge of the county court of Warwickshire holden at Rugby.

The plaintiff claimed (1.) the delivery up of a pony sold to the plaintiff by the defendant at an auction held by him at Rugby Cattle Market on September 21, 1903, and wrongfully detained by the defendant; or, alternatively, 26*l.* 5*s.*, the value of the pony, and damages for its detention; (2.) further, in the alternative, the plaintiff claimed 20*l.* damages for breach of warranty of authority by the defendant to sell the pony.

1904

RAINBOW v. HOWKINS.

The defendant gave notice of the following defence: that s. 4 of the Sale of Goods Act, 1893, had not been complied with, as the defendant had not signed any memorandum or note of the alleged contract.

The facts were as follows: The defendant, who was an auctioneer, had been instructed by a Dr. Dukes to sell his pony by auction at the Rugby Cattle Market, with a reserve price of 25*l*. The sale was held on September 21, 1903, and was attended by the plaintiff. The defendant on putting the pony up for sale stated that it was the property of Dr. Dukes, and, in forgetfulness of his instructions, also stated that the sale was without reserve. The plaintiff bid 15*l*. 15*s*. for the pony, and, there being no other bidders, the pony was knocked down to him for that price. The defendant immediately afterwards discovered, and informed the plaintiff, that he had made a mistake in offering the pony for sale without reserve, and he thereupon put the pony up for sale again, when it was bought in by the defendant for seventeen guineas. No note or memorandum in writing of the sale to the plaintiff was made by the defendant.

The county court judge held that the Sale of Goods Act, s. 4, was a good defence to the first head of claim; and as to the second head, that, the principal having been disclosed, the defendant was not personally liable, and he therefore gave judgment for the defendant.

The plaintiff appealed.

J. C. Gordon, for the plaintiff. Sect. 4 of the Sale of Goods Act only relates to direct sales, not to contracts relating to or connected with them: *Warlow* v. *Harrison* (1), per Martin B. Therefore, although the plaintiff may not be able to recover from the defendant on a contract of sale, yet the defendant is clearly liable for damages for breach of warranty of authority; and s. 4 affords no defence to that claim. An auctioneer who puts property up for sale without reserve pledges himself or contracts that the sale shall be without reserve, and that an action will lie at the suit of the highest bonâ fide bidder against the auctioneer for breach of that contract: *Warlow* v.

(1) 1 E. & E. 309, at p. 317.

1904

RAINBOW v. HOWKINS.

Harrison. (1) Further, by s. 58 of the Sale of Goods Act, a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer. Immediately that happened in this case the property in the pony passed to the plaintiff, and he can therefore maintain an action in tort for the wrongful detention of the pony by the defendant.

Pritchett, for the defendant. The judgment of the county court judge was right. *Warlow* v. *Harrison* (1) is not an authority for the general proposition stated on behalf of the plaintiff. The decision there, as was pointed out in *Mainprice* v. *Westley* (2), was based on the fact that the name of the vendor had not been disclosed to the buyer. If, as was done in the present case, an auctioneer gives the name of the vendor, he is then avowedly only an agent, and provided that he acts within the scope of his authority he binds the vendor, his principal. In the circumstances of the present case, if the requirements of s. 4 of the Sale of Goods Act had been complied with, there would have been a contract on which the vendor could have been sued, because an auctioneer instructed to sell has an implied authority to sell without reserve: that is one of the ordinary incidents of an auctioneer's position; and the bidders, therefore, are entitled to assume that the auctioneer has that authority unless and until the contrary is made known to them; and the principal could not as against the highest bidder at the sale rely on secret instructions given by him to the auctioneer, by which the ordinary implied authority of the auctioneer had been limited: *Gadd* v. *Houghton* (3); *Howard* v. *Sheward* (4); *Collen* v. *Gardner*. (5) In the present case, the defendant's principal having been disclosed and the contract being one binding on the principal (although he would, if sued, have had a good defence in s. 4 of the Sale of Goods Act), the defendant cannot himself be made liable for breach of warranty of authority: *Saffron Walden Building Society* v. *Rayner* (6); Leake on Contracts, 4th ed. p. 345.

[KENNEDY J. referred to *Manser* v. *Back*. (7)]

(1) 1 E. & E. 309.
(2) (1864) 6 B. & S. 420.
(3) (1876) 1 Ex. D. 357.
(4) (1866) L. R. 2 C. P. 148.
(5) (1856) 21 Beav. 540.
(6) (1880) 14 Ch. D. 406.
(7) (1848) 6 Hare, 443.

In *Manser* v. *Back* (1) there had been a revocation of the auctioneer's authority, though not communicated to the purchaser; but that is a very different thing from secretly imposing a restriction upon his authority.

[*Franklyn* v. *Lamond* (2) and Hart on the Law Relating to Auctioneers, 2nd ed., were also referred to.]

Gordon replied.

Cur. adv. vult.

May 9. The judgment of the Court (Lord Alverstone C.J., Wills and Kennedy JJ.) was read by

KENNEDY J. In this case we are of opinion that the plaintiff's appeal fails. The claim is put in two ways: first, for delivery of a pony or payment of 26*l.* 5*s.*; secondly, in the alternative, 20*l.* damages for breach of warranty of authority as auctioneer to sell the pony without reserve. We are of opinion, on the authority of *Woolfe* v. *Horne* (3), which is a more recent decision than *Mainprice* v. *Westley* (4), cited to us by the defendant's counsel, that an action for wrongful refusal to deliver a chattel sold at public auction may in some circumstances successfully be brought against the auctioneer, although the principal's name is disclosed to the buyer at the time of the sale. We see no material distinction between the facts in *Woolfe* v. *Horne* (3) and the facts in the present case, except that in that case apparently no question of a statutory defence arose in regard to the requirement which existed at the date of that action under s. 17 of the Statute of Frauds, and exists now under the Sale of Goods Act, s. 4. In the present case the chattel is of the value exceeding 10*l.*, and the statutory defence is relied upon by the defendant. It is not suggested that there was any signed memorandum or note within the meaning of the statute. The case of the plaintiff, therefore, so far as it consists of a claim for the refusal to deliver the chattel in accordance with the alleged contract of sale, fails; not because an auctioneer whose principal is disclosed cannot be sued for the refusal to deliver the chattel sold, but because the purchaser by reason of the Sale of Goods Act cannot maintain an action in respect of the contract.

(1) 6 Hare, 443.
(2) (1847) 4 C. B. 637.
(3) 2 Q. B. D. 355.
(4) 6 B. & S. 420.

1904

RAINBOW v. HOWKINS.

Kennedy J.

There remains for consideration the claim for damages for the alleged breach of warranty of authority to sell. In our judgment this also fails. There was, apart from the point arising under the Sale of Goods Act, s. 4, a contract of sale binding upon the defendant's principal. The hammer had fallen, and as between the plaintiff as the highest bidder and the auctioneer's principal the right of the plaintiff could not have been defeated by the principal shewing that the auctioneer was authorized by him to sell only subject to a reserved price. The defendant, the auctioneer, had an apparent authority, which his principal, if he had been sued by the plaintiff, would not have been allowed in point of law to repudiate, after a sale had been concluded by the hammer being knocked down, upon the ground that his private instructions had been contravened by the auctioneer in selling without reserve. *Warlow* v. *Harrison* (1) was cited to us by the plaintiff's counsel. But in that case the auctioneer never made a contract, as he refused to accept the plaintiff's bid, although it was the best genuine one, and therefore he never did effect a contract between his principal and the plaintiff. Here the answer to the plaintiff's claim on the ground of breach of warranty or misrepresentation of authority is that there was none. The defendant's principal was as much bound as if he had made the bargain himself; but the action fails for a totally different reason, namely, the want of a signed contract.

Whether an action would lie against the auctioneer for failing to make an entry in his books which could bind his principal we do not stop to inquire; no such point as constituting a ground of claim was made at the trial, and it is not open to the plaintiff. We have dealt with the only question which arose upon the present appeal.

Appeal dismissed.

Solicitors for plaintiff: *Smith, Fawdon & Co., for Sir Thomas Wright & Sons, Leicester.*

Solicitors for defendant: *Gibson & Weldon, for H. Granger Prior, Rugby.*

(1) 1 E. & E. 309.

F. O. R.

In re ALLISON, JOHNSON & FOSTER, LIMITED. *Ex parte* BIRKENSHAW.

1904
April 13;
May 3.

Company—Winding-up—Invalid Appointment of Liquidator—Claim for Remuneration—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 67.

A company which had resolved on voluntary winding-up by a resolution, which was subsequently set aside by the Court as invalid, appointed the appellant to be liquidator. On a compulsory winding-up of the company the appellant sought to prove as a creditor for work done and expenses incurred by him while purporting to act as liquidator, and before he knew of the invalidity of his appointment:—

Held, that neither under s. 67 of the Companies Act, 1862, nor on a quantum meruit was he entitled to be paid anything for services rendered as liquidator; but in so far as any work then done by him had been useful to the company for business purposes unconnected with the voluntary liquidation, or had been used by the official receiver and liquidator in the compulsory winding-up with full knowledge of the facts, he was entitled to claim reasonable remuneration.

APPEAL from the decision of the county court judge at Kingston-upon-Hull upholding the rejection by the official receiver and liquidator in the winding-up of the company known as Allison, Johnson & Foster, Limited, of the claim of Messrs. Birkenshaw & Young to prove as creditors in the winding-up for the sum of 165*l.* 0*s.* 3*d.*

The following statement of facts is taken from the written judgment of Kennedy J.

The company in January, 1903, was embarrassed by such financial difficulties that at a directors' meeting on the 16th of that month, which seems to have been attended only by the chairman and one other director, it was resolved that it was advisable to wind up the company voluntarily, and that the appellant William Parker Birkenshaw, who is a chartered accountant, should be appointed liquidator. On the following January 28 a meeting, which is described in the company's minute-book as an extraordinary general meeting of shareholders, was held at which resolutions to the same effect are recorded as having been passed; but only Mr. Hushwood Irving Foster (the chairman) and a Mr. F. E. Johnson were

1904

ALLISON, JOHNSON & FOSTER, LIMITED, *In re.* BIRKENSHAW, *Ex parte.*

present, of whom the last named took no part in the voting; and the proceedings were set aside as invalid ab initio by the order of Farwell J. in the following July. On the same day—January 28—the company's solicitors, Messrs. Shackles & Dunkerly, wrote to Mr. Birkenshaw and informed him of his appointment, under the resolutions, as liquidator, which he accepted; and he continued to act until July 25, when he was served with a writ and notice of an interim injunction. The company has since been in course of winding-up under the order of the Court.

The work in respect of which the claim is made was work done by Birkenshaw, as liquidator under the resolutions of January 28, employing in portions of it, as a liquidator who is an accountant commonly does, both his partner Young and the clerks in the firm's office.

Particulars of the work appear in a statement which he sent in with the claim to the official receiver and liquidator.

Adams, for the appellant. The appellant is entitled to claim for the work that he has done for the company on the ground that by s. 67 of the Companies Act, 1862, the appointment of a liquidator shall be deemed to be valid, notwithstanding any defect that may afterwards be discovered in the appointment: *In re Bridport Old Brewery Co.* (1); *Dawson* v. *African Consolidated Land and Trading Co.* (2); *British Asbestos Co.* v. *Boyd.* (3) He is at any rate entitled to be paid for the services he has rendered as on a quantum meruit. If the company accepted the work he did and benefited by that work, there is an implied request to do the work, and it must be paid for.

Tindal Atkinson, K.C. (*H. S. Cautley* with him), for the respondents. Sect. 67 of the Companies Act, 1862, was not intended to apply to the case of a liquidator in regard to the company itself. Its object was to validate transactions between a person having apparent authority and the outside world. As pointed out by Chitty J. in *Harben* v. *Phillips* (4), the general object of such a provision is to protect outside persons who

(1) (1867) L. R. 2 Ch. 191.
(2) [1898] 1 Ch. 6.
(3) [1903] 2 Ch. 439.
(4) (1882) 23 Ch. D. 14, at pp. 27, 28.

deal with the corporation. Even if it operated to validate the acts of the liquidator until the mistake was discovered, it cannot enable him to charge for that which he has done without authority.

Nor can he recover on a quantum meruit, since all that he has done was quâ liquidator; and as his appointment was void no request to act as liquidator can be implied.

Adams replied.

Cur. adv. vult.

May 3. The judgment of the Court (Lord Alverstone C.J., Wills and Kennedy JJ.) was read by

KENNEDY J. In this case the judgment of the learned county court judge at Kingston-upon-Hull has upheld the rejection by the official receiver and liquidator of the claim of Messrs. Birkenshaw & Young, trading as Carill, Birkenshaw & Ferguson, to prove as creditors in the winding-up of the above-named company for 165*l.* 0*s.* 3*d.* The appellants ask us to reverse that judgment.

The material facts are few and simple, but they raise a point of some difficulty upon which there appears to be no express or direct authority in the reports. [The learned judge then stated the facts as above set out, and continued:—]

It appears to us that the judgment of the county court judge, in so far as it upholds the rejection in toto of the appellant's claim, ought not to be upheld, but should be varied in the way and to the extent which will appear later on.

It was sought by the appellant's counsel to justify the claim on, substantially, two alternative grounds—first, as valid under the 67th section of the Companies Act, 1862; secondly, as a good claim at common law for remuneration upon the basis of a quantum meruit in respect of work and labour done for the company at its request.

In regard to the first and main contention of the appellants, we are of opinion that the learned county court judge was right. The 67th section validates acts done by de facto directors, managers, and liquidators, notwithstanding any defect that may afterwards be discovered in their appointments or

1904

ALLISON, JOHNSON & FOSTER, LIMITED, *In re.* BIRKENSHAW, *Ex parte.*

Kennedy J.

qualifications. It has been held that the provision covers, not merely acts which affect the relations between the company and persons outside the company who have no notice of the defect, but also acts affecting members in their relation to the company and the relations of the members of the company inter se: *Dawson* v. *African Consolidated Co.* (1) and *British Asbestos Co.* v. *Boyd.* (2) But we do not see on principle (and no authority for the contention was cited to us on the argument) how this provision can be used to justify the claim of a person against the company for services as liquidator when he never had authority from the company to act as liquidator. The remuneration of a liquidator in a voluntary winding-up may be fixed by a resolution of the company (The Companies Act, 1862, s. 133, sub-s. 3); if not so fixed, it has to be settled by the Court as the Court thinks just: see *In re Amalgamated Syndicates, Ld.* (3) In this case there was no resolution of the company at the so-called meeting of January 28 fixing Mr. Birkenshaw's remuneration as liquidator, and, if there had been, it would have been invalid; and we are at a loss to see how the Court can be asked to award him remuneration out of the funds of the company in liquidation for work done, whether by himself personally or under his direction by his clerks or partners, in a capacity in which he was never validly authorized by the company to act. Nor does the appellant in our judgment make out a good common law claim to reward for the work he did, merely because he did it. There can be no implied contract for payment arising out of acceptance of the work done where the work was done upon an express request which turns out to be no request at all, but which down to the time when the whole of the work had been done was supposed by both parties to be valid and operative. But we think that if and so far as the appellant can prove that his labours have been beneficial to the company, and have been accepted by the company for business purposes of the company unconnected with liquidation, or have been utilized with full knowledge of the facts by

(1) [1898] 1 Ch. 6. (2) [1903] 2 Ch. 439.
(3) [1901] 2 Ch. 181.

the official receiver and liquidator of the company in the winding-up which has been carried on under the Court's order, it is consistent alike with law and equity for us to hold that there has been such an acceptance of them upon an implied promise of reward (a promise of reward to be implied from making use of materials prepared by him for which they must have paid some one else if they did not use what he had done) as entitles Mr. Birkenshaw to this extent to claim to be remunerated on the basis of a quantum meruit. So holding, we think that the proper direction to give on the appellant's application will be that the items of the appellant's claim should be investigated by the registrar, and that the claim should be admitted by the official receiver and liquidator for such a sum, if any, as should upon such investigation be found to be just and proper remuneration for the work, if any, done by Mr. Birkenshaw (whether personally or under his direction by his partner, or the firm's clerks) since January 28, 1903, of which the company had the benefit for business purposes unconnected with liquidation, or of which the official receiver and liquidator has since availed himself in the winding-up.

Order varied accordingly.

Solicitors for appellant: *Woodhouse & Davidson, for J. T. Woodhouse, Aske & Ferens, Hull.*

Solicitors for respondents: *Maples, Teesdale & Co., for Davis, Hull.*

A. P. P. K.

1904
May 5.

HAMMOND, APPELLANT *v.* FARROW, RESPONDENT.

Poor-rate—Payment—"A Term not exceeding Three Months"—Tenancy from Week to Week—Poor Rate Assessment and Collection Act, 1869 (32 & 33 *Vict. c.* 41), *ss.* 1, 2.

A tenancy from week to week determinable by a week's notice on either side is a tenancy for "a term not exceeding three months" within ss. 1 and 2 of the Poor Rate Assessment and Collection Act, 1869.

CASE stated by justices.

On January 19, 1904, a complaint was preferred by the respondent, who was collector for the overseers of the poor for the township of Bury, against the appellant, for that he, the appellant, then being a person duly rated and assessed to the relief of the poor of Bury in and by a poor-rate made on March 26, 1903, for the year ending March 25, 1904, and payable by two equal instalments on March 27 and October 1, and being liable to pay 13*s.* 6*d.* in respect of the first instalment and 19*s.* 6*d.* in respect of the second, had neglected and refused to pay the same.

The following facts were proved or admitted. The rate had been duly laid and published, and the appellant was properly rated. The appellant was what is known as a weekly tenant, that is to say, the tenement in respect of which he was rated was held by him as a tenant from week to week at a rent of 7*s.* 3*d.* a week, but not for any certain number of weeks. There was no express agreement for notice, or as to the length of notice required, to determine the tenancy; but by local custom prevailing between landlords and tenants of weekly tenements a week's notice was given on either side. The appellant had neither given nor was under any such notice in respect of his tenement. The appellant had at the date of the hearing occupied the tenement for six months, and he was only liable to an apportioned part of the first instalment of the rate, namely, 13*s.* 6*d.* The payment of that sum, and also of 19*s.* 6*d.*, the second instalment, had been duly demanded of the appellant, and had not been paid.

The appellant contended that he was entitled to the benefit of s. 2 of the Poor Rate Assessment and Collection Act, 1869 (1), and that he, therefore, could not be compelled upon the present complaint to pay a greater amount of the rate than would be due for one quarter of the year.

The respondent contended that the expression "a term not exceeding three months" in s. 1 of the Act meant a term certain which would determine at a given date not exceeding three months without notice from either landlord or tenant, and that the appellant was not entitled to the benefit of s. 2 of the Act.

The justices upheld the contention of the respondent, and ordered the appellant to pay the sums claimed.

The question for the opinion of the Court was whether, upon the above statement of facts, the justices' decision was right in law.

C. C. Scott, for the appellant. A tenancy from week to week determinable by a week's notice on either side is a tenancy for a term not exceeding three months, for it may last only two weeks. In order to prevent a case from coming within s. 2 of the Act the tenancy must be one which must, not may, last longer than three months. The appellant is, therefore, entitled to the benefit of s. 2, and the justices had no power to order him to pay the full amount of the rate.

Danckwerts, K.C., and *Gordon Hewart*, for the respondent. The decision of the magistrates was right. In the case of a weekly tenancy there is not a new tenancy created each week; it is one tenancy continuing for an indefinite term until determined by notice: *Jones* v. *Mills* (2); *Gandy* v. *Jubber* (3); *Bowen* v. *Anderson*. (4) A tenant from week to week is, therefore, not "the occupier of any rateable hereditament let to

(1) Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41):—

Sect. 1: "The occupier of any rateable hereditament let to him for a term not exceeding three months"

Sect. 2: "No such occupier shall be compelled to pay to the overseers at one time or within four weeks a greater amount of the rate than would be due for one quarter of the year."

(2) (1861) 10 C. B. (N.S.) 788.

(3) (1865) 9 B. & S. 15.

(4) [1894] 1 Q. B. 164.

1904

HAMMOND v. FARROW.

him for a term not exceeding three months" within the meaning of s. 1. It is for the appellant who is claiming the benefit of s. 2 to shew that his case comes within the language of the Act, and he fails to do so if he shews that his tenancy is not for a term certain of three months or less, but may last for an indefinite period.

[WILLS J. A lease from year to year is a lease "not exceeding the term of three years from the making thereof" within s. 2 of the Statute of Frauds.]

The Act in question here was passed in order to facilitate the collection of rates, and its language ought not to be construed by reference to the interpretation put upon the language of a statute passed many years ago and dealing with an entirely different subject-matter.

Scott replied.

LORD ALVERSTONE C.J. The question which arises in this case is whether the appellant, against whom an order has been made for the payment of the amount of a poor-rate, is entitled to the benefit of s. 2 of the Poor Rate Assessment and Collection Act, 1869. That section provides that "no such occupier shall be compelled to pay to the overseers at one time or within four weeks a greater amount of the rate than would be due for one quarter of the year." The words "no such occupier" refer to the words "the occupier of any rateable hereditament let to him for a term not exceeding three months" in s. 1. It is admitted that in this case an order has been made for the payment of more than one quarter of the rate. The case finds that the appellant occupies a house under a weekly tenancy—that is, a tenancy from week to week until determined by a week's notice on either side. It is contended for the respondent that, because the tenancy may, in the absence of notice determining it, possibly continue for a longer period than three months, it is not one of the tenancies contemplated by s. 2 of the Act. In my opinion that argument is not sound. We are dealing with an Act one of the objects of which was to assist occupiers of small means holding premises on short terms. I do not think that it was intended to deprive a

1904

HAMMOND v. FARROW.

Lord Alverstone C.J.

weekly tenant of the benefit of s. 2 merely because he might be permitted by his landlord to continue as a weekly tenant for a period exceeding three months. In my opinion, in order to deprive a tenant of the benefit of s. 2, it is necessary to shew that he has by virtue of the letting an absolute right as against his landlord to occupy the premises for more than three months; where the tenancy may, at the option of the landlord, be determined at the end of the second week, it is impossible in my view to hold that the premises are let to the tenant for a term exceeding three months. I therefore come to the conclusion that the appellant is entitled to the benefit of s. 2, and that the decision of the magistrates was wrong.

WILLS J. I agree entirely with what my Lord has said. With regard to the argument that the language of s. 2 is not apt to express a weekly tenancy, I should like to point out that exactly the same phraseology is used in s. 2 of the Statute of Frauds, yet it has always been considered, so far as I know, that a lease from year to year is a lease for a term not exceeding three years, and can, therefore, be created by parol. It is true that the Act in question in this case is a modern one; but it was framed by persons who were familiar with the language of the Statute of Frauds and with the interpretation which has been put upon it, and I can see no reason why a tenancy from week to week should be held to be a tenancy for a term exceeding three months, when a lease from year to year is a lease for a term not exceeding three years. Such a construction is in strict analogy with the meaning which has been given to agreements "not to be performed within the space of one year from the making thereof" in the Statute of Frauds, namely, agreements which of necessity cannot be performed within the year. I think that the persons who are intended to have the benefit of s. 2 of the Act of 1869 are persons who have not a tenancy secure for more than three months. A tenancy which may, but which will not necessarily, last more than that period is not in my opinion a tenancy for a term exceeding three months.

1904

HAMMOND v. FARROW.

KENNEDY J. I agree. I think that, if one reads the words of the section in their ordinary and natural meaning, it is impossible to say that a tenancy from week to week is a tenancy for a term exceeding three months.

Appeal allowed.

Solicitors for appellant: *Nicol, Son & Jones, for Pickstone & Jones, Radcliffe.*

Solicitors for respondent: *Callard & Vulliamy, for J. Isherwood, Bury.*

F. O. R.

1901
April 27.

BRASS *v.* LONDON COUNTY COUNCIL.

Factory — "Tenement Factory" — Fire-escape — Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *ss.* 14, 149.

By s. 149 of the Factory and Workshop Act, 1901, the expression "tenement factory" is defined to mean "a factory where mechanical power is supplied to different parts of the same building occupied by different persons for the purpose of any manufacturing process," &c.:—

Held, that by the words "is supplied" must be understood "is supplied from the same source," and that a building the parts of which, being occupied as factories by different persons, have each their own independent supply of mechanical power, is not within the definition.

Toller v. *Spiers & Pond, Ld.*, [1903] 1 Ch. 362, followed.

CASE stated by an arbitrator under s. 14, sub-s. 3, of the Factory and Workshop Act, 1901.

By a notice in writing dated June 3, 1902, the London County Council, under the provisions of sub-s. 2 of the said section, required William Brass, as being the owner of the premises 31A, Old Street, and 90, Goswell Road, Finsbury which premises were alleged to be a tenement factory within the meaning of the said Act, to provide reasonable means of escape in case of fire for the persons employed therein, and for that purpose to carry out the measures specified in the notice. A difference of opinion having arisen between W. Brass and the council, the matter was referred to arbitration. The premises to which the notice referred consisted of a

group of buildings belonging to W. Brass and divided into three parts. One of these parts was let by Brass to the Paper Cutting Company, Limited. It consisted of a manufactory situate wholly on the ground floor, partially covered by a slate roof and lighted by skylights. The access to it was from Goswell Road. It was fitted with a number of machines driven by a gas-engine belonging to the Paper Cutting Company, and twenty-five persons were employed in it. There were no communications from this part to the rest of the premises. A second part of the premises, which was let to Pillivant & Co., a firm of cardboard-box manufacturers, consisted of a basement, ground floor, and first and second floors. The two latter floors projected, to the extent of an area of 66 feet by 24 feet, over the ground floor occupied by the Paper Cutting Company, which was separated from this portion of the first floor occupied by Pillivant & Co. only by a wooden floor carried on iron girders. The access to these premises was from Old Street. The machinery for the box-making, in which 141 persons were employed, was driven by steam power from an engine in the basement. The third part of Brass's premises was occupied by Brass himself as a builder's store. The chief measures specified by the council in the notice of June 3 were the provision of a new staircase, connecting the first and second floors in the occupation of Pillivant & Co. with the portion of the ground floor in the occupation of the Paper Cutting Company, and the carrying out of these measures would, apart from the provisions of the Act, have involved a trespass by Brass upon the premises of the Paper Cutting Company.

The arbitrator found that the premises were not provided with such means of escape in case of fire for the persons employed therein as could reasonably be required in the circumstances of the case, but he stated a case for the opinion of the Court as to whether upon the facts stated the premises were a tenement factory within the meaning of s. 14 of the Factory and Workshop Act, 1901 (1), and as to whether the

(1) By the Factory and Workshop Act, 1901, s. 14, sub-s. 2, "With respect to all factories" of which the construction was commenced before

1904

BRASS v. LONDON COUNTY COUNCIL.

different parts constituted one building. Previously to the passing of the Act of 1901 similar proceedings had been taken to compel Brass to provide means of escape in case of fire, and they had failed upon the ground that he could not be required to provide means of escape which involved a trespass on the premises of other persons.

Macmorran, K.C., and *Garland*, for Brass. No doubt the enactment in s. 14, sub-s. 2, of the Act of 1901, that "the owner shall, notwithstanding any agreement with the occupier, have power to take such steps as are necessary for complying with the requirements," was designed with the very object of getting rid of such a difficulty as that which arose in the former proceedings. But the Act fails in effecting its object, for a group of buildings such as that belonging to Brass does not come within the definition of a "tenement factory" in s. 149. Here the only parts of the buildings which are used as factories are those in the occupation of the two tenants, and

January 1, 1892—"in which more than forty persons are employed, it shall be the duty of the district council of every district"—or in the county of London the London County Council (s. 153)—"from time to time to ascertain whether all such factories within their district are provided with such means of escape as aforesaid"—i.e., of such means of escape in the case of fire for the persons employed therein as can reasonably be required under the circumstances of each case (sub-s. 1)—"and in the case of any factory which is not so provided to serve on the owner of the factory. . . . a notice in writing specifying the measures necessary for providing such means of escape as aforesaid, and requiring him to carry them out before a specified date, and thereupon the owner shall, notwithstanding any agreement with the occupier, have power to take such steps as are necessary for complying with the requirements."

Sub-s. 7: "For the purposes of this section the whole of a tenement factory shall be deemed to be one factory and the owner shall be substituted for the occupier."

Sect. 149: "The expression 'tenement factory' means a factory where mechanical power is supplied to different parts of the same building occupied by different persons for the purpose of any manufacturing process or handicraft, in such manner that those parts constitute in law separate factories; and for the purpose of the provisions of this Act with respect to tenement factories all buildings situate within the same close or curtilage shall be treated as one building."

they have each their own supply of mechanical power. Therefore they are not "supplied" with mechanical power within the meaning of the section. It has been decided by Buckley J. in *Toller* v. *Spiers & Pond, Ld.* (1), that the words "supplied to" mean "taken by the factory occupier from a source of supply external to himself." The definitions of "textile factory" and "non-textile factory" in the same section speak of premises wherein mechanical power "is used." Due effect must be given to the change of language in the definition of "tenement factory." Secondly, these two factories are not within the same curtilage, for the access to them is from different streets, and the mere fact that one to some extent overlaps the other can make no difference.

Avory, K.C., and *Dumas*, for the London County Council. The Court is not bound by the decision of Buckley J. There is no reason for limiting the application of the fire-escape provisions in s. 14 to those tenement factories in which the different parts are supplied with mechanical power from an outside source. The more numerous the sources of supply of such power the greater the risk of fire. "Supplied to" means nothing more than "used by."

Macmorran, K.C., in reply.

LORD ALVERSTONE C.J. I am of opinion that this group of buildings is not a tenement factory within the meaning of s. 14 of the Factory and Workshop Act, 1901. That section provides that all factories in which more than forty persons are employed shall be furnished with reasonable means of escape in case of fire for the persons employed therein. And by sub-s. 7, for the purposes of that section "the whole of a tenement factory . . . shall be deemed to be one factory." Then s. 149 defines what a tenement factory is: "The expression 'tenement factory' means a factory where mechanical power is supplied to different parts of the same building occupied by different persons for the purpose of any manufacturing process or handicraft, in such manner that those parts constitute in law separate factories; and for the purpose of the provisions of this

(1) [1903] 1 Ch. 362.

1904

BRASS v. LONDON COUNTY COUNCIL.

Lord Alverstone C.J.

Act with respect to tenement factories all buildings situate within the same close or curtilage shall be treated as one building." Now speaking for myself, although it is not necessary for me to decide the point in the view which I take of the earlier part of the section, I entertain a strong opinion that the building occupied by the Paper Cutting Company and that occupied by Pillivant & Co. cannot be said to be within the same curtilage, so as to be treated as different parts of one building. But in my view the facts here do not bring these buildings within the earlier part of the definition: mechanical power was not "supplied to different parts" of the building. I understand that expression "supplied to" to mean supplied from one and the same source; but here Mr. Brass's two tenants had each their own separate supply. Had the Legislature meant nothing more than a factory where mechanical power is used in different parts of the same building occupied by different persons, it would have been more natural for them to have said so. They probably had in their minds the case, which is very common in the north of England, of a number of small factories occupying different floors in a large building, each floor being supplied with motive power from a central source, generally belonging to the owner of the premises. And I am supported in this view by the fact that the definitions of "textile factory" and "non-textile factory" in the same section mean factories of certain kinds in which mechanical power "is used" to move or work any machinery, or in aid of any manufacturing process carried on there. Further, though we are not bound by the decision of a judge sitting alone in the Chancery Division, we should not differ from it unless we were clearly satisfied that it was wrong. In *Toller* v. *Spiers & Pond, Ld.* (1), Buckley J. took the same view, and with the reasoning of his judgment I entirely concur. I therefore come to the conclusion that these buildings are not a tenement factory within s. 14, and that Mr. Brass cannot be required to provide the means of escape specified in the notice; and the case must be remitted to the arbitrator with a direction to that effect.

(1) [1903] 1 Ch. 362.

WILLS J. I am of the same opinion. No one can say that this definition clause is free from difficulty. Whichever view we take, certain anomalies present themselves to one's mind, and not much assistance is to be got from external considerations of policy. If the definition of "tenement factory" means what Mr. Avory contends, the draftsman has certainly employed a very awkward method for expressing that meaning. I do not desire to repeat the reasons given by my Lord and Buckley J., but I think they abundantly justify the conclusions at which we have arrived. I should like to add that in my opinion these buildings cannot possibly be said to be within the same curtilage upon any reasonable construction of that term.

KENNEDY J. I agree. To give to the words "supplied to" the same meaning that is given to the word "used" is not to give the full effect to all the words of the section. I also assent to the view that these buildings are not "situate within the same close or curtilage" within the meaning of the section. I cannot help thinking that we should be in great difficulties if we were to hold that the mere fact of one factory overlapping another caused them to be within the same curtilage.

Judgment for Brass.

Solicitor for Brass: *H. C. Morris.*
Solicitor for London County Council: *Blaxland.*

J. F. C.

1904
April 23.

MAXWELL *v.* BRITISH THOMSON HOUSTON COMPANY, LIMITED. BLACKWELL & CO., THIRD PARTIES.

Practice—Costs—Indemnity by Third Parties—Appeal—Costs as between Solicitor and Client.

The plaintiff recovered judgment against the defendants for damages and costs in an action for injuries sustained by reason of the negligence of the defendants' sub-contractors, who were brought in as third parties, and who had undertaken to be answerable for all accidents and damages that might occur during the progress of the work, and to indemnify and bear the defendants harmless therefrom. The defendants appealed, but the third parties, who received notice of the appeal, did not give any sanction or co-operation to the appeal, which was dismissed with costs:—

Held, that the third parties were not compelled by the indemnity to pay to the defendants the costs of the appeal.

In the absence of special circumstances, a person indemnifying another against the costs of an action must pay them as between party and party, and is not bound to pay them as between solicitor and client.

FURTHER CONSIDERATION before Kennedy J.

By a contract with the corporation of Leeds the defendants undertook to carry out the necessary work for applying electric power to the tramways, the property of the corporation. They employed Messrs. Blackwell & Co. to adjust the electric wires to fixed posts along the line of the tramways, and by the contract between the defendants and Blackwell & Co. the latter agreed to be answerable for all accidents and damages personal, consequential, or otherwise that might occur during the progress of the work, and to indemnify and bear the defendants harmless therefrom. Whilst engaged on the work, Blackwell & Co. used a movable derrick for the purpose of attaching the wires, and on the occasion in question they had left projecting from the derrick a metal rod overhanging the tramline. The plaintiff, while travelling on the top of a tramcar, was brought into contact with this rod, and sustained severe injuries, for which she brought an action against the defendants. The defendants served a third-party notice under Order XVI., r. 48, upon Blackwell & Co., who delivered a defence, and appeared by

counsel at the trial, but took no active part in the proceedings. The action was tried at the Leeds Assizes before Kennedy J. and a special jury, and a verdict for the plaintiff was returned.

Kennedy J. entered judgment for the plaintiff for damages—the amount of which had been agreed—and costs, and these were paid to the plaintiff by the defendants, the costs having been taxed as between party and party.

The defendants appealed to the Court of Appeal from this judgment, and on an ex parte application they obtained from that Court leave to serve notice of the appeal on Blackwell & Co. The solicitor to Blackwell & Co. on receipt of the notice notified the defendants that the appeal was not prosecuted at the request or with the sanction of the third parties, and they did not appear on the hearing of the appeal.

The appeal having been dismissed with costs by the Court of Appeal, the case came on for further consideration before Kennedy J. on the question (inter alia) as to the extent to which the third parties were liable to indemnify the defendants in respect of the costs of the action and of the appeal.

Roskill, K.C., and *Horace Marshall*, for the defendants. If the appeal was reasonable, the defendants are entitled to be indemnified in respect of it. The right course to be pursued where third parties are interested in the result of an appeal was laid down by Fry L.J. in *In re Salmon* (1), and has been followed here. If the appeal had been unreasonable, the Court of Appeal would have declined to allow the third parties to be served with the notice. The defendants are, therefore, entitled to be indemnified in respect of the costs incurred by them: *Agius* v. *Great Western Colliery Co.* (2); *Grébert-Borgnis* v. *Nugent* (3); *Hammond* v. *Bussey*. (4) The costs of the trial at Leeds must be allowed the defendants on a taxation as between solicitor and client: *Wiley* v. *Smith* (5); *Born* v. *Turner* (6); *Hartas* v. *Scarborough*. (7) If the costs are only

(1) (1889) 42 Ch. D. 351.
(2) [1899] 1 Q. B. 413.
(3) (1885) 15 Q. B. D. 85.
(4) (1887) 20 Q. B. D. 79.
(5) (1894) 1 Ir. Rep. 153.
(6) [1900] 2 Ch. 211.
(7) (1889) 33 Sol. J. 661, 639.

1904

MAXWELL v. BRITISH THOMSON HOUSTON COMPANY.

paid by the third parties as between party and party, the defendants do not get a complete indemnity.

Scott Fox, K.C., and *Bairstow*, for the third parties, were not called upon to argue these points.

KENNEDY J. It is contended that on the terms of their contract to indemnify, Blackwell & Co., the third parties, are liable to indemnify the defendants for all the expenses reasonably incurred by them as the result of the negligence of the third parties, and that the costs of the unsuccessful appeal are part of those reasonable expenses. The third parties do not contest that if, as has been decided, the particular negligence was within the terms of the indemnity, they are liable to pay to the defendants the damages recovered by the plaintiff and the costs of the action. The first question is whether they are liable also to pay to them the costs of the appeal. It was brought, no doubt, with notice to them, but without any sanction or co-operation on their part. I do not think that there is any authority for holding that in the absence of special circumstances an indemnity against loss incurred through negligence includes an indemnity against the costs of an appeal from the decision of the Court which tries the case. In my opinion the defendants are not entitled to succeed on that part of the case. Then as to the costs of the action at Leeds: it seems to me, in the absence of authority to the contrary, that (1) a person who is indemnifying another against the costs of an action cannot, unless there are some special circumstances, be called upon to pay them as between solicitor and client. He must pay them as between party and party; but I do not think that he is bound to pay more.

Judgment accordingly.

Solicitors for defendants: *Ashurst, Morris & Co.*
Solicitors for third parties: *Johnstone & Wilcy.*

(1) See, however, Seton's Forms of Judgments and Orders, 6th ed. vol. iii. ch. xlviii., form 12, p. 2142. The attention of the judge was not called to this at the time, but his Lordship has since brought it to the notice of the reporter.

A. P. P. K.

POLLEY *v.* FORDHAM.

1904
April 15.

Public Authorities' Protection—Limitation of Actions—Magistrate—Improper Conviction—Distress—Public Authorities Protection Act, 1893 (56 & 57 *Vict.* c. 61), s. 1.

A magistrate, having convicted and fined the plaintiff for an offence under the Vaccination Acts, issued a distress warrant in default of payment of the fine, and a distress was put in on the plaintiff's premises accordingly. Subsequently the conviction of the plaintiff was quashed for want of jurisdiction. In an action by the plaintiff against the magistrate for illegal distress :—

Held, that the period limited by s. 1 of the Public Authorities Protection Act, 1893, began to run from the entry on the plaintiff's premises, and not from the date of the conviction.

APPEAL from the Shoreditch County Court.

On February 11, 1903, the plaintiff was convicted by the defendant, who was one of the metropolitan police magistrates, for neglecting to have two of his children vaccinated, and was fined 1*l.* and costs in each case. The plaintiff having failed to pay the fines, the defendant issued a warrant of distress against the goods of the plaintiff, and on April 17, 1903, a distress was put in on the plaintiff's premises. The plaintiff under protest paid out the distress on April 29.

On July 8 the Divisional Court quashed the convictions on the ground that the information was out of time, the children being twins eighteen months of age at the date of the conviction. (1)

On August 26 the plaintiff issued the summons in the present action in the county court, claiming damages from the defendant for an illegal distress.

The county court judge held that the plaintiff's action was out of time and was barred by s. 1, sub-s. *a* (2), of the Public

(1) See *Langridge* v. *Hobbs*, [1901] 1 K. B. 497.

(2) By the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1, "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or

1904

POLLEY v. FORDHAM.

Authorities Protection Act, 1893, considering that the action complained of was the conviction by the defendant on February 11, on which the distress followed as a matter of course.

He accordingly entered judgment for the defendant, and the plaintiff appealed.

Kingsbury, for the plaintiff. The county court judge was wrong; the act complained of was the trespass to the plaintiff's goods and not the conviction. The conviction and the distress are quite separate acts. This is plain from s. 3 of the Justices Protection Act, 1848 (11 & 12 Vict. c. 43), which provides that where a conviction or order is made by one justice, and a warrant of distress is granted thereon by another, no action shall be brought against the justice granting the warrant for any defect in the conviction or order, but the action, if any, shall be brought against the justice making the conviction or order. [He referred to *Brittain* v. *Kinnaird*. (1)]

G. S. Robertson, for the defendant. The county court judge was right; the distress is the natural consequence of the conviction, and it is the conviction which was the act complained of within the meaning of the statute. Sect. 3 of the Justices Protection Act, 1848, shews that this was the view of the Legislature. The issuing of the distress warrant was a purely ministerial act.

LORD ALVERSTONE C.J. I express no opinion as to whether this action can be maintained, or as to whether there is a defence to it. The only point before us is whether the learned county court judge was right in applying this Statute of Limitations to the alleged right of action so as to bar the proceedings, and whether in fact he has rightly declined to entertain

in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect:—

"(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof."

(1) (1819) 1 B. & B. 432; 21 R. R. 680.

1904

POLLEY v. FORDHAM.

Lord Alverstone C.J.

the action upon the ground that it had not been commenced within six months next after the act complained of. We have to construe sub-s. (*a*) of s. 1 of the Act of 1893. That provides a statutory limitation, and must be construed strictly: "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect: (*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of." The act complained of here was not, in my opinion, the conviction. The act complained of was the trespass to the plaintiff's premises by the levying of the distress. So far as it has any bearing on the case, s. 3 of the Justices Protection Act, 1848, does not seem to me to have anything to do with the question of time. Sect. 3 is for the purpose of protecting a justice who has issued a warrant upon a conviction apparently legal by some other justice, which subsequently turns out to have been made without jurisdiction. In such a case the section provides that no action will lie against the justice issuing the distress warrant; but the action, if any, must be brought against the justice who made the original order. In this case the action is for trespass, and there is a plea of justification. In such a case it would require a very plain enactment with regard to a statutory limitation to say that the period is to run, not from the date of the real cause of action, the entry on the premises, but from some order of anterior date under the authority of which that entry was made. It may be that there are enactments which enable a man who has a cause of action in respect of some act of a magistrate to claim as damages matters of aggravation in respect of subsequent acts done as corollary to that act. That is quite possible; but I am unable myself to see any ground on which we are enabled to say that the right of action for wrongful entry has been taken away if the action is commenced

1904

POLLEY v. FORDHAM.

Lord Alverstone C.J.

within six months of the act which is alleged to be wrongful. I think if it was intended to throw back the period from which the limitation begins to run to an earlier date and to an earlier act on the part of the defendant, there must be clear and distinct language to that effect. Whatever may be the result of this action, when it comes to be heard, I think the case must go back to the county court judge.

WILLS J. I am of the same opinion. It seems to me the act complained of is the distress and nothing else. No such thing was ever heard of as an action for making an order against a person without jurisdiction. If the order is not followed by consequences against the individual, it comes to nothing. Actions for illegal distress of one sort or another were at one time very common, but such actions were always actions of trespass. The form of the complaint used to be that the defendant had wrongfully entered the house or premises of the plaintiff and had done so and so. Then any question which arose about the warrant, the conviction, or order on which the erroneous proceedings by way of distress and entry were founded was raised on a defence setting up that it was justified because of the warrant and the conviction or order on which the warrant was founded. But the action itself was not for erroneous exercise of jurisdiction, but was for making a distress and breaking and entering a man's premises where there was no right to do so. No such action as that suggested by the respondent will be found in Bullen and Leake; in Chitty on Pleading; or in any of the books of precedents.

KENNEDY J. I agree.

Appeal allowed.

Solicitor for plaintiff: *H. T. Nicholson.*
Solicitor for defendant: *The Treasury Solicitor.*

A. P. P. K.

THE KING *v.* JUSTICES OF KENT.

1904
May 12.

Highway—Proceedings for Diversion—Resolution of District Council to request Justices to view—Period for which Notice must be fixed at Ends of Highway—Highway Act, 1835 (5 & 6 *Will.* 4, *c.* 50), *ss.* 84, 85.

In proceedings for the diversion of a highway under s. 85 of the Highway Act, 1835, it is essential to the validity of a certificate of justices under that section that the notice of proposed diversion, which is thereby required to be affixed at each end of the highway proposed to be diverted, should be first so affixed at such a date as to leave a period of twenty-eight days between the date of the affixing and the date of the issue of the certificate.

A resolution of a district council under s. 84 of the Highway Act, 1835, directing their surveyor to apply to two justices to view a highway which it is proposed to divert, is not exhausted by the fact that the first two justices applied to, having viewed, refuse to certify that the proposed new highway is nearer or more commodious; and a second set of justices to whom the surveyor applies have jurisdiction to issue a certificate without any fresh resolution of the council in that behalf.

CERTIORARI to quash a certificate of justices in proceedings for the diversion of a highway and order of quarter sessions directing the enrolment of the same.

On April 25, 1903, certain persons of the name of Abrey and Isard, by a notice in writing addressed to the urban district council of Tonbridge, in the county of Kent, and to their clerk, gave notice that they were the owners of certain land called the Blue Barn estate and were desirous of diverting a certain footpath and substituting therefor another and more commodious highway across the Blue Barn estate, and requiring the clerk to summon a meeting of the council and submit their proposal to the council. On July 1 a resolution of the council was passed directing their surveyor (1) to apply to two justices to view the highway proposed to be diverted. On July 3 the surveyor applied to Messrs. C. F. Kemp and

(1) As to the power of the surveyor of the urban authority to do ministerial acts required by any Act of Parliament to be done by the surveyor of highways, see s. 144 of the Public Health Act, 1875.

1904

REX v. KENT JUSTICES.

R. Wingate, two justices of the peace, to view the highway. They did view, and with the result that they refused to certify that the proposed substituted way was more commodious to the public. On November 9, without any fresh application by Messrs. Abrey and Isard to the district council, or any fresh resolution by the council in that behalf, the surveyor applied to two other justices, Messrs. A. T. Beeching and H. R. Brown, to view the highway. On November 11 the last-named justices viewed, and directed the surveyor to affix the necessary notice of diversion at the side of the highway and to advertise the same in the newspaper as required by s. 85 of the Highway Act, 1835. (1) On November 14 the surveyor affixed the notice at the side of the path. The notice was dated November 11, and stated that the justices' certificate would be lodged with the clerk of the peace on December 7. He also inserted a similar notice in a newspaper called the *Tonbridge Free Press*, which is published in Tonbridge on Saturdays and is circulated in the district. The notice appeared in the issues of that newspaper on November 14, 21, and 28, and December 5. A similar notice was affixed on the church doors on Sundays,

(1) By the Highway Act, 1835, s. 84,—If any person is desirous of diverting a highway, he is to cause a meeting of the vestry (now the district council) to be summoned and submit his proposal to them, and if they agree the surveyor of highways is to apply to two justices to view the highway.

Sect. 85: "When it shall appear upon such view of such two justices of the peace made at the request of the said surveyor as aforesaid that any public highway may be diverted so as to make the same nearer or more commodious to the public, and the owner of the lands or grounds through which such new highway so proposed to be made shall consent thereto by writing under his hand the said justices shall direct the surveyor to affix a notice in the form, &c. at the place and by the side of each end of the said highway from whence the same is proposed to be diverted and also to insert the same notice in one newspaper published or generally circulated in the county for four successive weeks next after the said justices have viewed such public highway, and to affix a like notice on the door of the church, &c. on four successive Sundays next after the making such view; and the said several notices having been so published and proof thereof having been given to the satisfaction of the said justices the said justices shall proceed to certify under their hands the fact of their having viewed the said highway as aforesaid, and that the proposed new highway is nearer or more commodious to the public."

November 15, 22, and 29, and December 6. On Monday, December 7, the justices issued their certificate, which on the same day was lodged with the clerk of the peace. The certificate stated that the justices making it had viewed the highway proposed to be diverted and also the proposed new highway, and that upon the view they found the new highway would be more commodious to the public for the following reasons: "Because the said old highway is a mere footpath across an open field which is very wet and muddy in winter and very inconvenient whilst the proposed new highway will be of the uniform width of six feet and will be formed with a solid bottom and with a three-inch top course of tar paving. It is understood that such six-foot footpath will eventually form part of a new thirty-six-foot roadway to be ultimately lighted and taken over by the urban district council of Tonbridge." The certificate recited that Messrs. Abrey and Isard were the owners of the Blue Barn estate, but did not state that they were the owners of the land on which the proposed new highway was to be made. The justices, however, at the time of making the certificate had before them depositions which shewed that the site of the new highway was parcel of the Blue Barn estate. The certificate having been issued, a Mr. Eastwood and the Tonbridge Rural District Council appealed to the quarter sessions against the certificate and the order for diversion. On January 7, 1904, the appeal was heard, when the quarter sessions dismissed the appeal and ordered the certificate to be enrolled. The appellants obtained a rule for a certiorari to quash the certificate and the order of quarter sessions upon the grounds (amongst others)—that after the refusal of the first two justices to certify, no other justices could issue a certificate without a fresh resolution of the district council directing the surveyor to request such justices to view; that there was no sufficient proof before the justices of a consent by the owners of the land to the substituted highway being made; that s. 85 was not complied with in respect to the notices either at the ends of the highway, or on the church doors, or in the newspaper; and that the reasons given by the justices in their certificate for

1904

REX v. KENT JUSTICES.

determining that the new footpath would be more commodious were insufficient and bad.

Dickens, K.C., R. Cunningham Glen, and *H. C. Dickens*, for the justices, shewed cause. The objection that the certifying justices had no jurisdiction to view and certify is unsound. The certificate is not in the nature of an order; it is merely preliminary to the proceedings before the quarter sessions, where the whole matter is open, and where the question is gone into on the merits. In *Reg.* v. *Justices of Surrey* (1) Hannen J. pointed out that the proceedings under s. 85 "are all proceedings which lead up to an order to be made in quarter sessions." All that is wanted is that two justices should inform the quarter sessions; it is immaterial who those two justices are. There was sufficient evidence of consent by the owners of the land on which the new highway was proposed to be made. It is not necessary that the certificate should recite the consent. The section "only requires the owner's consent as a fact": per Lush J., *Reg.* v. *Justices of Surrey*. (2) There is no substance in the objection that s. 85 was not complied with as regards the notices. They were in fact posted on the church doors on the four successive Sundays next after the view, and were published in the four successive weekly issues of the local newspaper published next after the view. With regard to the notices at the ends of the highway, there is nothing in s. 85 specifying any period of time during which they are to be fixed there. They were in fact fixed there for a sufficient length of time to give the public reasonable opportunity of learning of the proposed diversion. It is no doubt true that the justices, if they find that the new highway is more commodious, must state in their certificate the reasons why it is more commodious, and those reasons must, as was stated in *Reg.* v. *Wallace* (3), "be disclosed by the view upon their own personal inspection." But the certificate here does state sufficient reasons appearing from the view. The fact that it goes on to state an understanding that the footpath

(1) (1869) L. R. 5 Q. B. 87, at p. 92. (2) (1872) 26 L. T. 22, at p. 24.
(3) (1879) 4 Q. B. D. 641.

would later on be enlarged is superfluous and immaterial. The distinction between *Reg.* v. *Wallace* (1) and the present case is that in the former the only reasons given in the certificate were stated to be disclosed upon inquiries.

Danckwerts, *K.C.*, and *Hohler*, in support of the rule. The justices who issued the certificate had no jurisdiction to do so. The resolution of the council directing their surveyor to apply to two justices to view was exhausted by the first application made. The first justices having refused a certificate, the parties seeking the diversion should, if they desired other justices to view, have commenced the proceedings de novo, and obtained a fresh resolution of the council. It cannot be that the consent of the body who now represent the vestry under s. 84 is unnecessary, or that two justices may view and certify mero motu without being put in motion in the manner therein specified, but if the consent is necessary then that body—here the district council—ought, when the first justices applied to have refused their certificate, to have an opportunity of reconsidering the question of their consent. Here they had no such opportunity. Secondly, it is a condition precedent to the jurisdiction of the justices that they should at the time of the view when they direct the surveyor to fix the notices, and not merely at the time of making the certificate, have evidence of the landowner's consent. Moreover, the certificate must state the fact of the consent—it "ought to state all that is required to be proved before the justices": per Blackburn J., *Reg.* v. *Harvey*. (2) Here the certificate is silent as to the owners' consent. Thirdly, the notices were not published sufficiently long before the issue of the certificate. They are to be inserted in the newspaper for four successive weeks. That means four whole weeks, or twenty-eight days. It is clear that if the notice were inserted in a daily paper nothing less than four whole weeks would suffice. Equally must that be so if the paper resorted to is only a weekly paper. In which case the certificate must not be made until the seventh day after the fourth issue of the paper. Here it was made on December 7, the last issue of the paper containing the notice being

(1) 4 Q. B. D. 641. (2) (1874) L. R. 10 Q. B. 46, at p. 50.

1904

REX v. KENT JUSTICES.

on December 5. So, too, the notices were not posted sufficiently long at the ends of the footpath. They were only posted there twenty-three days before the certificate, whereas they should have been up twenty-eight days. The words "four successive weeks" apply to the notices at the ends of the highway as well as to the advertisements in the newspaper. Lastly, the certificate was bad, upon the ground that it did not state that the reasons for the finding that the proposed new footpath would be more commodious were derived solely from the view: *Reg.* v. *Wallace.* (1) The justices had no right to take into account an understanding as to the future widening of the footpath which no one could enforce.

LORD ALVERSTONE C.J. I have come with regret to the conclusion that the objection to the validity of the justices' certificate, on the ground that s. 85 of the Highway Act, 1835, was not complied with as regards the notices at the ends of the road, must prevail. On the face of the certificate it appears that that notice would not appear at the ends of the road for the period of twenty-eight days. Indeed, that it could not have been so fixed for that time is shewn by the notice itself, which was dated November 11, and stated that the certificate of the justices having viewed, &c., would be lodged with the clerk of the peace on December 7. As a matter of fact the notice was not put up till November 14, which left only a period of twenty-three days before the date of the certificate. Now it is well established that it is essential to the validity of the certificate that all the formalities required by the statute should be strictly observed, the procedure given by it being in substitution for that under the old writ of ad quod damnum. And the question to be decided is whether the statute fixes a period of twenty-eight days as the time during which the notice is to be put up at the ends of the road. Sect. 85 provides that, if upon the view the justices are satisfied that the proposed diversion will be to the interests of the public, "the said justices shall direct the surveyor to affix a notice in the form or to the effect of schedule (No. 1 *a*) at

(1) 4 Q. B. D. 641.

the places and by the side of each end of the said highway from whence the same is proposed to be diverted, ... and also to insert the same notice in one newspaper for four successive weeks next after the said justices have viewed such public highway." And if those words, "for four successive weeks," do not apply to the fixing of the notice at the ends of the road as well as to the inserting of it in the newspaper, there is no period limited for the former act at all. Then the section provides that, "the said several notices having been so published," the justices shall proceed to certify, &c. The fair inference to be drawn is that these opportunities afforded to the public of becoming aware of the proposed diversion shall extend over the period of four full weeks or twenty-eight days, so that the notice must be first put up at such a date as admits of its being exhibited for twenty-eight days before further proceedings are taken. Objection was also taken that, as two other justices had previously viewed the footpath and refused to grant a certificate, the resolution of the council of July 1 was thereby exhausted, and that before any application to a second set of justices could be made the proceedings must be commenced over again and a fresh resolution of the council obtained. But there is nothing in the statute which suggests the necessity of so doing. No doubt the proceedings cannot continue unless a certificate is obtained, but it must be borne in mind that the issue of that certificate is only a preliminary matter, the real merits being subsequently dealt with at quarter sessions. In my opinion the resolution of July 1 was sufficient to give the justices jurisdiction to issue the certificate which they did. Nor do I think there was any substance in the objection that the certificate did not recite that the parties proposing the diversion were the owners of the land over which the substituted footpath was to be made. It is not necessary that it should do so. If any authority were required, the case of *Reg.* v. *Justices of Surrey* (1) amply supports the view that all that the Act requires is the owners' consent as a fact, not that the consent should appear in the certificate. On the point with which I first dealt, namely, the

(1) 26 L. T. 22.

1904

REX v. KENT JUSTICES.

non-compliance with the statutory provision as to the exhibition of notices on the road, the certificate must be quashed.

WILLS J. I am of the same opinion. I think the objection that there was no proper publication of the notice by reason of its not having been fixed at the ends of the highway for a sufficient length of time is fatal to the validity of the certificate and to the subsequent proceedings at quarter sessions. My impression is that the period of four weeks has in practice always been applied to the fixing of the notice at the ends of the highway, and not merely to the advertisement in the newspaper. If that were not the proper construction of the section there would be no time provided at all during which the notice was to be fixed. And it is highly improbable that the Legislature should not have intended to prescribe a time for that purpose. No doubt "to affix a notice for four successive weeks" is not a strictly grammatical expression —it should have run "to affix and keep affixed"; but the objection on the score of grammar cannot weigh against the improbability that I have referred to. We were much pressed by Mr. Danckwerts with the contention that the consent of the owners to the making of the substituted highway ought to have appeared on the face of the certificate. It seems to me that that is sufficiently answered by the case of *Reg.* v. *Justices of Surrey*. (1) There is one other point I should like to refer to. Objection was taken that the certificate was bad because it was alleged that it did not clearly state that the reasons upon which the justices proceeded in arriving at their finding that the new highway would be more commodious were reasons which were wholly disclosed by the view itself, and Mr. Danckwerts relied upon the case of *Reg.* v. *Wallace* (2) as shewing that if the reasons for the finding were derived partly from inquiries from third persons that would be enough to invalidate the certificate; and here it was said the result of inquiries was an understanding by the justices that the new footpath would eventually form part of a thirty-six-foot roadway. But I do not think *Reg.* v.

(1) 26 L. T. 22.

(2) 4 Q. B. D. 641.

Wallace (1) is an authority for that proposition. It cannot be that if the justices certify that upon the view they found the new way would be more commodious, the fact that they go on to state certain additional reasons disclosed by inquiries from third persons would make the certificate bad. It is not disputed that they may make inquiries, and if so they ought to be entitled to state the fact that they have made them. Otherwise a certificate which told the whole truth would be bad, while one which told half the truth would not.

KENNEDY J. I am of the same opinion. I also regret to be obliged to accede to this application; but I think the objection that the time during which the notices were put up at the ends of the footpath was insufficient is a sound objection. It seems to me upon that point difficult to give any satisfactory meaning to the words of the section except that which is given by my Lord. I think that the notice must be first affixed at such a date as will leave a period of twenty-eight days between the date of the affixing and that of the making of the certificate. How far the notice must be kept affixed during that period I express no opinion. I should be sorry to say that, where the notice had been first affixed at a sufficient date to leave the full period of twenty-eight days, the mere fact that it was subsequently during that period torn down, either intentionally or by accident, would invalidate the subsequent proceedings. It might, no doubt, in such a case be material to consider whether the fact of the notice being so torn down had been brought to the notice of the parties interested. But that question does not arise here. Upon the point that the certificate was bad because the justices who made it were not the same two justices who first viewed the highway, I agree with my Lord that the point is not good. If the Legislature had meant that only the first two justices who viewed should have jurisdiction to make the certificate, it is difficult to understand why they did not provide for the contingency of the illness or death of one of them. It can hardly have been intended that if one of the justices died before the certificate

(1) 4 Q. B. D. 641.

1904

REX v. KENT JUSTICES.

Kennedy J.

the whole proceedings would have to be begun over again. All that is necessary is that two justices should vouch to the quarter sessions that there is a primâ facie case for diversion. There is nothing in the section to shew that they must be the same two justices. I also agree that the certificate cannot be held bad on the ground that it does not state that the finding of the new way being more commodious was based solely on the view. No doubt it must state that the finding was upon the view, and it does so state it here; but it cannot be that the additional statement of superfluous matters will render bad a certificate which is already good.

With respect to the consent of the owners of the land, it is enough that that consent should exist in fact at the time when the justices give the direction to the surveyor to affix the notice; and here it is abundantly clear that the owners did in fact consent. There was no necessity that proof of that consent should appear in the certificate.

Rule absolute for certiorari.

Solicitors for justices: *Neve & Williams, Tonbridge.*

Solicitors for appellants: *Collyer-Bristow & Co., for Stone, Simpson & Mason, Tonbridge Wells.*

J. F. C.

JACKSON *v.* WIMBLEDON URBAN DISTRICT COUNCIL.

1904
March 3.

Local Government—Drain or Sewer—Single Drain draining several Houses belonging to the same Owner—Sewer draining into single Private Drain—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 41—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19.

A drain conveying the drainage of two or more houses belonging to the same owner into a single private drain (as described by s. 19 of the Public Health Acts Amendment Act, 1890) is a sewer, and is not affected by s. 41 of the Public Health Act, 1875.

CASE stated by justices under the Summary Jurisdiction Acts.

On August 19, 1903, the appellant appeared before a Court of summary jurisdiction in obedience to a summons charging him with having made default in payment of the sum of 35*l.*, due from him to the respondents for expenses incurred by them in relaying the main drain at the rear of Nos. 51, 53, 55, 57, 59, 61, 63, 65, 67, 69, 71, and 73, Hartfield Crescent, Wimbledon, and also with having made default in payment of 13*l.* 7*s.* 5*d.*, being a proportion of the expenses incurred by the respondents in relaying a single private drain connecting No. 73 and No. 75, Hartfield Crescent with a certain public sewer.

On the north side of Hartfield Crescent in the respondents' district there are sixteen houses numbered with odd numbers from 51 to 81 both inclusive. The appellant is the owner of twelve of these houses numbered from 51 to 73 both inclusive. No. 75 and Nos. 77, 79, and 81 are in the hands of different owners. At the rear of the sixteen houses runs a main or common drain which is connected with the public sewer by a branch drain which runs between No. 73 and No. 75 beneath a piece of land between those two houses. Each of the sixteen houses is connected with the main or common drain by means of branch drains conveying the sewage from each house.

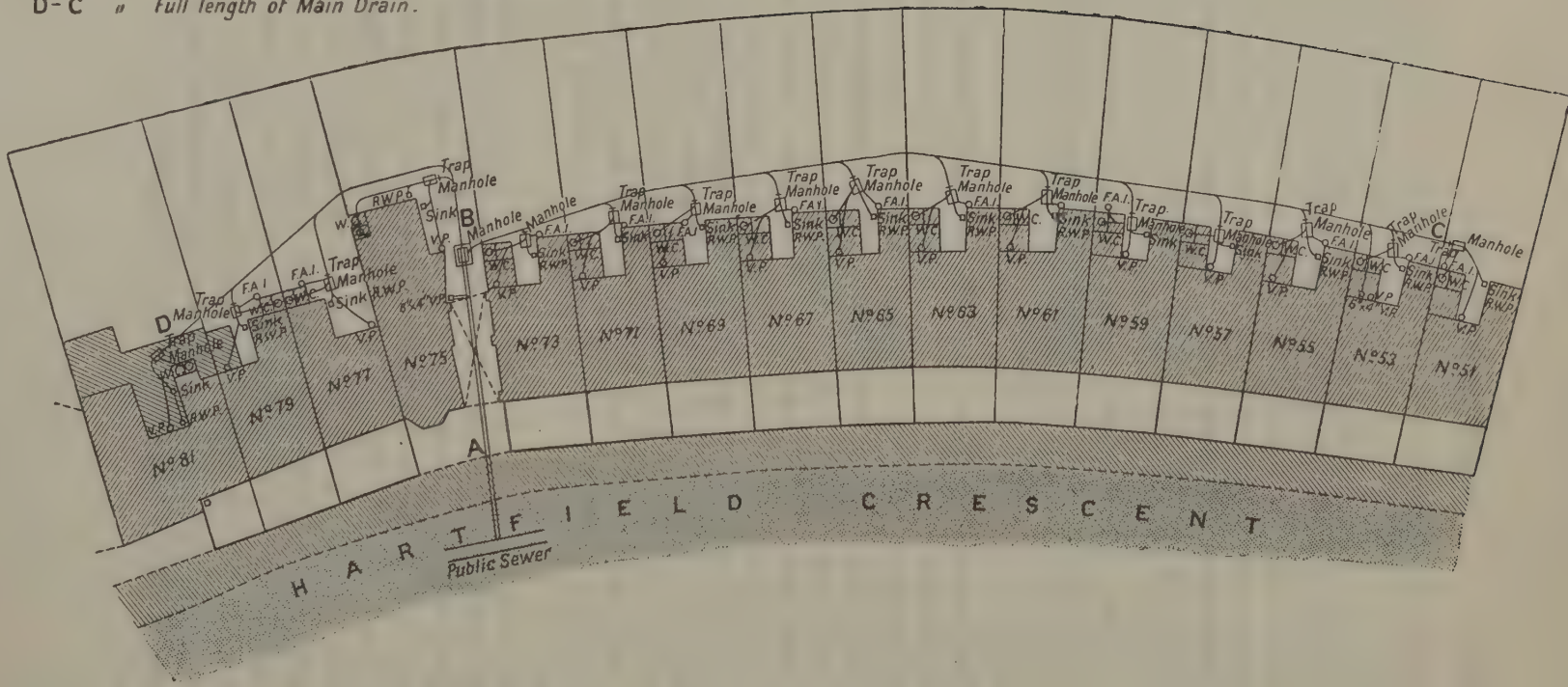
A–B shows joint drain from Houses of { Mrs Eysoldt (77-81) / Mr C.D. Holliday (75) / Mr D. Jackson (51-73) three Owners.

B–C " Mr Jackson's.

B–D " Main drain from Houses of Mr Holliday & Mrs Eysoldt.

D–C " Full length of Main Drain.

PLAN



On the plan put in at the hearing, and which is here reproduced, the main or common drain at the rear of the sixteen houses was marked D to C, and the branch drain which ran from a point between Nos. 73 and 75 to the public sewer was marked B to A, and both the main drain D to C and the branch drain B to A were constructed wholly upon private property. Part III. of the Public Health Acts Amendment Act, 1890, which includes s. 19 of the Act, has been adopted in the respondents' district.

Complaint having been made to the respondents, as the local authority under the Public Health Act, 1875, as to the drains in Hartfield Crescent, the respondents caused the drains to be inspected, and found that it was necessary to relay the main or common drain D to C, and also the branch drain B to A, and caused notice in writing to be given to the owners of the sixteen houses requiring them within a specified time to do the necessary works. The owners of Nos. 75 and 77–79 and 81 duly executed the works required so far as affected the main or common drain D to B at the rear of these premises, but made default in executing the works required to the branch drain B to A. The appellant, as owner of Nos. 51 to 73 inclusive, did not comply with the notice at all, but made default in executing the works required to be done both to the branch drain B to A, and also to the main or common drain C to B, and the respondents accordingly duly executed the works, and made an apportionment of the expenses by apportioning the expenses of relaying the branch drain B to A between the owners of the sixteen houses, and also the expenses of relaying the main drain B to C upon the appellant. The appellant having made default in complying with the demand of the respondents, these proceedings were taken. The amount of the apportionment was not in dispute, and at the hearing the appellant admitted that the branch drain B to A was a single private drain within the meaning of s. 19 of the Act of 1890, but he contended that the drain B to C was a sewer within the meaning of s. 4 of the Public Health Act, 1875, and not a single private drain within the meaning of the Act of 1890. The justices decided against this contention, and made an order

1904

JACKSON v. WIMBLEDON URBAN COUNCIL.

against the appellant for the payment of 35*l.*, but stated this case for the opinion of the Court. (1)

Sylvain Mayer, for the appellant. B to A being admitted to be a single private drain within the meaning of s. 19 of the Public Health Acts Amendment Act, 1890, the only question is as to C to B. Sect. 19 has no application to this, as it is confined to houses belonging to different owners, and these houses, 51 to 73, all belong to the appellant: *Bradford* v. *Mayor, &c., of Eastbourne* (2); *Reg.* v. *Mayor, &c., of Hastings.* (3)

Macmorran, K.C. (*George Humphreys* with him), for the respondents. The whole system of drainage must be taken together. It being admitted that A to B is a single private drain, it must follow that C to B also comes within the provision of s. 19 of the Act of 1890, since it connects the

(1) By s. 41 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), "On the written application of any person to a local authority stating that any drain on or belonging to any premises within their district is a nuisance or injurious to health the local authority may empower their surveyor to examine such drain If the drain on examination appear to require alteration or amendment the local authority shall forthwith cause notice in writing to be given to the owner or occupier of the premises requiring him forthwith or within a reasonable time therein specified to do the necessary works; and if such notice is not complied with the local authority may if they think fit execute such works and may recover in a summary manner from the owner the expenses incurred by them in so doing"

By s. 4, "'Drain' means any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed. 'Sewer' includes sewers and drains of every description except drains to which the word 'drain' interpreted as aforesaid applies"

By s. 19 of the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), "(1.) Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under s. 41 of the Public Health Act, 1875 and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses. . . .

"(3.) For the purposes of this section the expression 'drain' includes a drain used for the drainage of more than one building."

(2) [1896] 2 Q. B. 205.

(3) [1897] 1 Q. B. 46.

houses with the sewer at A. The meaning of a single private drain is a drain made on private ground with a single outlet into a public sewer: *Seal* v. *Merthyr Tydfil Urban District Council.* (1) It is impossible that C to B should be a sewer and B to A a single private drain. A sewer cannot drain into a drain.

1904

JACKSON v. WIMBLEDON URBAN COUNCIL.

Sylvain Mayer replied.

LORD ALVERSTONE C.J. I hope that the day will arrive when no question can arise as to what is a sewer and what is a drain, and that something may some day be done in the way of a declaratory or an amending Act to put these questions beyond the range of discussion. The difficulty probably arises from the fact that here modern provisions as to maintenance and repairs of drains are applied to old methods of drainage that have been built up under all kinds of systems.

Now the main proposition for which Mr. Macmorran contends is this: If s. 19 of the Act of 1890 applies to the lower part of the drain, you are entitled to go back to the end of all the drains that connect with the single private drains, and to bring them all within the purview of s. 41 of the Act of 1875. Stated in that way, the proposition goes too far. I have had a great deal of trouble in this case by reason of the fact that it is admitted that from A to B is a single private drain within s. 19 of the Act of 1890, and therefore, in respect to that part of it at any rate, proceedings could be taken under s. 41. But it does not follow that this takes you to the end of every pipe and makes all of them private drains because they happen to connect with a single private drain. It seems to me that if that were so, a person through whose land there was a sewer, the obligation of repairing which sewer was upon the local authority, might be deprived of his rights by the action of third persons, over whose actions he had no control at all. Therefore I think that that proposition is too wide.

Under these circumstances, what is the real question we have to decide?

(1) [1897] 2 Q. B. 543.

1904

JACKSON v. WIMBLEDON URBAN COUNCIL.

Lord Alverstone C.J.

From C to B, it is admitted, would be a sewer within the meaning of the Public Health Act, 1875, if it had discharged direct into a sewer at the point B, or if it had been connected by a pipe (which was not a single private drain) which ran from the point B to the sewer. At first I was inclined to think that it was difficult to contend that a sewer could drain into a single private drain, but, after the consideration this case has undergone and the argument that has been addressed to us, I think that that view of mine was not well founded.

The scheme of legislation originally provided that where there was a drain which drained more than two houses, or more than two buildings, it became a sewer (s. 4 of the Act of 1875). I can well imagine that there may be a drain, as in this case, carrying the drainage from a long row of houses, as to which it could not be denied that it would be a sewer. In the present case the pipes draining these houses do, in fact, empty on both sides into that which, for this purpose, must be taken as being a single private drain.

I do not think that the admission that the pipe B to A is a single private drain ought to be construed as being an admission that the whole of these pipes form part of a single private drain, because, whatever may have been the reasons for the admission, or however it came to be made, the point was distinctly raised at the hearing that from C to B was a sewer. Does s. 19 of the Act of 1890, which enables the local authority to apply s. 41 of the Act of 1875 to a single private drain, involve the proposition that, because there is a single private drain from B to A, the connections with that single private drain must be part of that single private drain and must be so regarded? As I have already pointed out, that might involve the loss of rights and the change of obligations which undoubtedly existed prior to the Act of 1890; and it would require clear and distinct words in order to bring about that result. The words of s. 19 are: "Where two or more houses belonging to different owners are connected with a public sewer by a single private drain." I am fully conscious of the difficulty of understanding what was meant by "a single private drain," having regard to the fact that if a drain does drain two houses belonging to

the same owner it becomes a sewer by virtue of the Act of 1875. But at the same time the Legislature, I think, certainly did not mean to sweep away the distinction between a drain and a sewer for all purposes. It is admitted that, for some purposes, the distinction will remain. It seems to me that the purview of s. 19 is to confine the operation of s. 41 to that which is a single private drain; and I point out that in the case of *Bradford* v. *Mayor, &c., of Eastbourne* (1) it was not contended, nor was it any part of the decision, that the obligations and the rights extended to anything which was not a single private drain in fact. It was not any part of that decision to decide that that which was connected with a single private drain must of necessity become a single private drain itself within the section. I cannot help thinking that the language of the most careful judgment of my brother Wills in that case rather excludes the idea that the matter was in any way considered by the Court beyond the particular question as to what was the meaning of "a single private drain" under s. 19 of the Act of 1890.

Therefore I think that we are entitled, notwithstanding the admission that the drain B to A is a single private drain, to say that that which was a sewer, namely, the pipe B to C, still remains a sewer, and that the fact that it connects with a single private drain at point B does not make any difference. It would have been a sewer had it connected with the main sewer by means of that which was itself a sewer or by a continuation of its own pipe. I do not think the fact that it does happen to pour out into a single private drain between the points A and B, and thereby get to the sewer, makes any difference for the purpose of deciding what is the character of the pipe which runs from C to B.

No doubt it is contended that there is here a private drain connecting two or more houses belonging to different owners with a public sewer, and, therefore, a case under s. 19 arises. I think that it is perfectly true so far as the portion of the pipe or conduit B to A is concerned, which is found to be a single private drain into which the other drains or sewers may

(1) [1896] 2 Q. B. 205.

1904

JACKSON v. WIMBLEDON URBAN COUNCIL.

Lord Alverstone C.J.

connect; but I see no reason why a sewer should not connect with the single private drain and then with another sewer.

For these reasons, which I admit are not easy to express clearly, having regard to the difficulty of the subject, I have come to the conclusion that the magistrates were wrong in deciding that the portion of the drain or conduit between C and B was a drain within the meaning of s. 41 of the Public Health Act, 1875, and not a sewer, and that this appeal ought to be allowed.

WILLS J. I have come to the same conclusion, though with considerable difficulty, because it seems to me that to reconcile s. 19 of the Act of 1890 with the general legislation on this subject is a work of extreme difficulty. The Court of which I was a member attempted to do it in the *Bradford* v. *Mayor of Eastbourne* (1), and I think, so far as that case was concerned, the attempt was not altogether unsuccessful. But now it comes to be applied to a different set of circumstances, and that brings one to a fresh difficulty, and one as to which the considerations of policy appear to me to be pretty evenly balanced; so there is a very great difficulty in saying that there is any particular reason why one should incline to one class of construction rather than another for reasons of public convenience or general advantage.

What appears to me to be the determining factor is that, although primâ facie s. 19 applies because there are two or more houses belonging to different owners, namely, those to the right and those to the left of the passage-way through which A to B is carried, and the consequence would seem to be that application may be made under s. 41 of the Act of 1875, yet when that section is looked at it is clear that the drain in respect of which complaint is to be made, and the drain in respect of which the local authority has the power of calling upon the owner to do the work and so on, are the same. If that is the case, then inasmuch as the obstruction was in Hartfield Crescent and not between A and B, s. 41 would not give any right to make an order in respect of A to

(1) [1896] 2 Q. B. 205.

B, whilst as to B to C the pipe is clearly a sewer except for the purposes of s. 19, which does not apply because all the houses belong to the same owner. There seems to be a certain sort of intelligent groundwork for such a view in this consideration, that if the obstruction does arise between A and B (that being a single private drain), generally speaking it is almost impossible to say which of the various effluents which meet in the pipe A to B is the one that does the mischief, and, therefore, it is reasonable enough that the expense of putting things right should be shared amongst all the people who use A to B. But that does not apply when you are dealing with B to C only, as from B to C the "houses belonging to different owners" which are necessary to bring in the operation of s. 19 of the Act of 1890 do not exist, and, excepting for the purposes of s. 19, from B to C is undoubtedly a sewer.

I do not say that these reasons are satisfactory. I very much doubt whether completely satisfactory reasons could be given for any decision under this s. 19; but I think, upon the whole, for the reasons which I have mentioned, that the decision which my Lord has announced is the correct one.

KENNEDY J. I think so too. I quite agree that it is very difficult to come to any satisfactory solution of the difficulties which are presented on one side or the other in connection with this case; but it seems to me that the least unsatisfactory is the one which my Lord has presented.

I will only add this: The section which is invoked by the respondents here is s. 19 of the Public Health Acts Amendment Act, 1890. To what does this relate? To put it shortly, it relates to the rights and duties of repairing a single private drain which connects two or more houses belonging to different owners with a sewer. Does any portion of B to C—and that is what we have to deal with—fulfil that condition? Clearly not; B to C is a complete length which would be a sewer and repairable by the public authority for the whole distance, because it is a length of conveyance of sewage—to avoid the words "drain" and "sewer"—not from different owners, but from the same owner. Does A to B satisfy it?

1904

JACKSON v. WIMBLEDON URBAN COUNCIL.

Kennedy J.

I think myself it does, and no question arises as to A to B. There from B to A you have got the different owners; you have got them connected by what certainly may be described as a single private drain. Does the fact, then, that A to B may be a single private drain, and does collect from houses owned by different persons, carry with it, so to speak, the right to treat as a single private drain within the section a range of drainage the connection of which at B is one of the elements (but one which by itself would be insufficient) to make A to B a single private drain? A to B only becomes a single private drain because of the connection with different houses which is involved in the connection at B, not only of B to C, but of B to D.

It seems to me that that which is the most simple, because the most natural, explanation of the words is also the one which on the whole least conflicts with the considerations that arise from the fact that this is an amending Act, and has to be read with the provisions of the earlier legislation, which undoubtedly did protect the private owner in respect of these things.

Appeal allowed.

Solicitors for appellant: *W. W. Young, Son & Ward.*

Solicitors for respondents: *Sharpe, Parker & Co., for Butterworth, Wimbledon.*

A. P. P. K.

ESCOTT *v.* THE MAYOR, &c., OF NEWPORT.

1904
Jan. 11, 12.

Local Government—Local Authority—Streets—Statutory Power to fix Posts "in or under" Streets—Trespass—Taking of Land—Newport Corporation Act, 1900 (63 & 64 *Vict. c. xlii.*), *s.* 51 (*Local*)—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 18, 68.

The corporation of a borough, being empowered by a local Act, which incorporated the Lands Clauses Acts, to erect and maintain "on, in, over, or under" any street in which their tramways were laid poles and posts for the purpose of working the tramways by mechanical power, erected a post for that purpose in the pavement forming part of a street, the post being sunk to a depth of six feet. The pavement at that point, and the soil beneath it, were the property of the plaintiff, subject to a right which had been acquired by the public to use the pavement as a public footpath. The post was erected without the plaintiff's consent, and he brought an action for trespass to his land against the corporation:—

Held, that the placing of the post in the plaintiff's soil was not a taking of his land so as to make s. 18 of the Lands Clauses Consolidation Act, 1845, apply, and that, as the defendants had erected the post under their statutory powers, the action could not be maintained.

APPEAL from a decision of the judge of the Newport County Court.

The action was for damages for a trespass alleged to have been committed by the defendants in placing in the plaintiff's land an iron pillar, and for a mandatory injunction to remove the pillar.

The admitted facts were, so far as they are material for the purposes of this report, as follows:—

The plaintiff was the assignee of a lease granted to his assignor, Page, for a term of ninety-nine years of a plot of land, on which a house and shop had been built by Page, abutting on Chepstow Road, Newport. Between the front walls of the house and shop and the roadway of Chepstow Road was a piece of ground included in the demise to Page. When he built the house and shop Page removed a hedge which then separated the piece of ground from Chepstow Road and paved the whole of the piece of ground from the house up to the roadway of Chepstow Road and put down a line of kerbing adjoining the roadway, this paving and kerbing

1904

ESCOTT v. NEWPORT CORPORATION.

being wholly on the land demised to him. Other houses on each side of Page's house were built from time to time, with pavements in front, forming, with the pavement in front of Page's house, a continuous line of pavement. Page carried on in the shop the business of a furniture dealer, and was in the habit of putting his furniture for sale on the pavement in front of his shop. The plaintiff since he bought the lease and business from Page had carried on a similar business, and had placed his furniture on the pavement in the same way. Subject to that user of the pavement by the plaintiff the public had gained a right to use the pavement as a public footpath. Chepstow Road is now a street of almost continuous lines of houses on either side with paved footpaths in front of them. In 1893 the defendants, in exercise of their statutory powers under local Acts, constructed a tramway in Chepstow Road passing in front of the plaintiff's premises. The tramcars used for the conveyance of passengers were then drawn by horses. In 1900 the defendants were empowered by the Newport Corporation Act of that year to use mechanical power on their tramways, and they adopted a system by which electrical power is supplied to the tramways from a continuous wire cable running along the tramway and suspended above it at a height of about twenty-five feet. The cable is supported by wires across the roadway at fixed distances, and the wires are fastened to hollow iron pillars on each side of the roadway. The defendants, without the plaintiff's consent, fixed one of these pillars in the pavement immediately in front of his shop, and within the boundaries of the plot of land demised by his lease. This was the trespass complained of. The pillar was thirty-one feet in height and about ten inches in diameter at the base, and was sunk in the ground beneath the pavement to a depth of about six feet.

The Newport Corporation Act, 1900 (63 & 64 Vict. c. xlii.), s. 51, sub-s. 1, provides: "For the purpose of working any of the corporation tramways by mechanical power or of providing access to or forming connection with any generating or other stations or any engines machines or apparatus the corporation may subject to the provisions of this Act construct lay down

place erect maintain renew and repair on in over or under any street or road in which any corporation tramways are for the time being laid cables conductors electric mains wires poles posts apparatus machinery works and appliances and the corporation may also make such alterations in any existing tramways of the corporation and execute all such works on and in connection therewith as may be necessary or expedient for adapting the same to be worked by mechanical power"

By s. 3 the Lands Clauses Acts were incorporated with the local Act, and s. 4 provided that the several words and expressions to which by the Public Health Act, 1875 (38 & 39 Vict. c. 55), meanings are assigned should have the same meaning in that Act. It was admitted that the roadway of Chepstow Road, and the footpaths on each side of it, including the pavement in front of the plaintiff's house and shop, were together a "street" within the meaning of the definition of that expression in s. 4 of the Public Health Act, 1875.

The county court judge was of opinion, on the authority of *Coverdale* v. *Charlton* (1) and *Baird* v. *Mayor, &c., of Tunbridge Wells* (2) that the defendants had such property only in the street as was necessary for the control, protection, and maintenance of the street as a highway for public use; that the placing of the pillar in the street was not necessary for those purposes, and that s. 51 of the Newport Corporation Act, 1900, did not entitle the defendants to take or use any portion of the plaintiff's property which he had not dedicated to the public. He therefore held that the defendants had committed a trespass, and offered, at the plaintiff's option, either to assess the damages he had sustained, or to make a declaration that the defendants were not entitled to the soil in which they had erected the pillar, and that its erection was a trespass upon the plaintiff's property.

The defendants appealed.

Macmorran, K.C. (*Corner* with him), for the appellants, There can be no doubt that the pavement in front of the

(1) (1878) 4 Q. B. D. 104. (2) [1894] 2 Q. B. 867; [1896] A. C. 434.

1904

ESCOTT v. NEWPORT CORPORATION.

plaintiff's house and shop was part of a "street" within the meaning of s. 51 of the local Act and s. 4 of the Public Health Act, 1875. The appellants, therefore, had an express statutory power to fix the pillar "in, over, or under" the street, and an action for a trespass in respect of their having acted under their statutory power cannot be maintained against them. In the last case on this subject—*Goldberg & Son, Ld.* v. *Mayor, &c., of Liverpool* (1)—the Court of Appeal held that no action would lie against a local authority who, acting bonâ fide in the exercise of their statutory power, had put down a pole and a fuse-box in the footpath for the purpose of supplying electrical power to tramcars, close to the principal entrance of the plaintiff's premises, and thereby caused a nuisance to him. The cases on which the county court judge founded his decision do not apply. It may be that the plaintiff has some right to compensation under the Lands Clauses Acts, but he is not entitled to maintain this action.

A. T. Lawrence, K.C., and *John Sankey*, for the respondent. The county court judge must be taken to have found that by placing the pillar in the plaintiff's soil six feet below the street the defendants have committed a trespass. They have exceeded the ordinary powers of a local authority in whom a street is vested. They cannot use anything more than the owner has dedicated to the public: *Baird* v. *Mayor, &c., of Tunbridge Wells* (2), judgment of A. L. Smith L.J. The question how much below the street vests in the local authority must be determined by reference to what is necessary for the user of the street quâ street: *Finchley Electric Light Co.* v. *Finchley Urban District Council.* (3) By authorizing the appellants to fix pillars "in or under" any street the local Act only intends to define the area within which the statutory powers are exercisable. The Lands Clauses Acts are incorporated with the local Act, and the appellants can only exercise their powers on paying compensation under those Acts. Here there was a taking or an injurious affecting of the plaintiff's land, and ss. 18 and 68 of the Lands Clauses Consolidation

(1) (1900) 82 L. T. 362. (2) [1894] 2 Q. B. 867, at p. 884.
(3) [1903] 1 Ch. 437.

Act, 1845 (8 & 9 Vict. c. 18), entitling him to compensation, apply. The defendants, a local authority, must strictly follow their statutory powers; if they do not, any interference with the land of a private owner is a trespass. The cases with respect to the right of local authorities to lay down sewers do not apply, because s. 308 of the Public Health Act, 1875, gives compensation for damage sustained by reason of the exercise of the powers of the Act.

Macmorran, K.C., in reply. No question of taking or injuriously affecting land arises here. The power to place something in or under the street does not imply any power to take land for that purpose. The appellants, therefore, were not bound to follow the procedure of s. 18 of the Lands Clauses Act, 1845. The power to lay sewers is analogous to the power to put posts in or under a street, and it has been held that local authorities in the metropolis may lay down sewers without first acquiring the land, notwithstanding that the works involve an actual taking of land: *North London Ry. Co.* v. *Metropolitan Board of Works* (1); *Hughes* v. *Metropolitan Board of Works*. (2) In *Mayor, &c., of Tunbridge Wells* v. *Baird* (3) Lord Herschell pointed out that, express power having been given to carry sewers under the streets, there was no necessity that the soil under the streets should be vested in the corporation for the purpose of enabling them to place sewers there.

Cur. adv. vult.

Jan. 12. LORD ALVERSTONE C.J. This case raises a point of considerable general importance which may arise in many other cases. It is desirable, however, not to say more than is necessary for the decision of the case now before us. The question raised is whether the fixing by the Newport Corporation of the iron pillar in the pavement and the causing it to penetrate the soil beneath to a considerable depth constitute a trespass in respect of which an action can be maintained.

(1) (1859) Joh. 405; 28 L. J. (Ch.) 909.

(2) (1861) 4 L. T. (N.S.) 318.

(3) [1896] A. C. 434, at pp. 441, 442.

1904

ESCOTT v. NEWPORT CORPORATION.

Lord Alverstone C.J.

The county court judge has found that by the dedication of the plaintiff the public had acquired a right of way over the pavement, subject to such interruption of that right as might occur through the plaintiff putting his furniture at times upon the pavement. It is clear that, so far as the surface is concerned, the pavement is vested in the corporation, who are the local authority. The plaintiff complains that the pillar goes down into the soil beneath the pavement to a greater depth than is vested in the corporation, or is necessary for the proper use of the right of way by the public, and that the acts done by the corporation constituted an occupation of land belonging to him, and therefore a trespass, which cannot be justified by statute or otherwise. If that were the true view, I should think that the plaintiff was right, and that he was entitled to a declaration that the placing of the pillar there was a trespass, and entitled perhaps, under certain circumstances, to an injunction. It seems to me, however, that a different view ought to be taken having regard to the statutes which affect this matter. Sect. 51 of the local Act, which incorporates the Lands Clauses Consolidation Act, 1845, empowers the corporation to place these pillars, or posts, "on, in, over, or under any street or road" in which their tramways are laid. They therefore, in my opinion, had power under that section to place this pillar in the pavement as they did. It is further said, however, for the plaintiff that putting the pillar there constituted a taking of land within the meaning of s. 18 of the Lands Clauses Consolidation Act, 1845, and that, as the corporation did not comply with the provisions of that Act with respect to giving notice to treat and paying compensation, that which they did cannot be justified under s. 51 of the special Act, but was a trespass. I cannot assent to that view. I am of opinion that, although the soil under the street belonged to a private owner, putting a post in and under the street in pursuance of s. 51 was not a taking of land within the meaning of the Act of 1845. It is not, to my mind, possible to say that because the post required support from the plaintiff's land there was a taking of that land within the meaning of the Act. If his land has been

injuriously affected by the post being placed in it, and support for the post being obtained from it, then he may have a remedy under s. 68 of the Lands Clauses Consolidation Act. I am, however, clearly of opinion that there has been no taking of the land by the corporation, and that, as that which they did was done under their statutory powers, this action for trespass cannot be maintained against them. This appeal must, therefore, be allowed. Wills J., who is unable to be present, desires me to say that he concurs in my judgment.

KENNEDY J. I am of the same opinion. I think there can be no doubt that the local authority in doing what they did acted strictly within the terms of s. 51 of the local Act, and were justified by that section in doing it. It was said that the section did not authorize, except with the owner's permission or licence, any interference with soil not vested in the local authority. I am not prepared to assent to that proposition. I think the proposition can be maintained that, although no property in the soil passes to the local authority, they have a right, under their statutory powers, to enter and do what is authorized by s. 51 within the area to which those statutory powers apply—that area being "on, in, over, or under, any street or road in which any corporation tramways are for the time being laid." That proposition seems to have been the basis of Chitty J.'s judgment in *Fareham Local Board and Fareham Electric Light Co.* v. *Smith* (1), and it is supported, I think, by what Jessel M.R. said in *Taylor* v. *Corporation of Oldham* (2) with respect to the analogous case of the vesting of sewers in local authorities. His observations seem to me to imply that, although the soil under the street may not be vested in the local authority, they may have certain rights of using it in the exercise of their statutory powers. There is nothing to the contrary in the cases on which the learned county court judge seems to have relied. It seems to me that the acts of the corporation, having been done within the area of their statutory powers, did not constitute a trespass to the plaintiff's soil. I think that the putting of the post in and

(1) (1891) 7 Times L. R. 443. (2) (1876) 4 Ch. D. 395, at p. 411.

1904

ESCOTT v. NEWPORT CORPORATION.

Kennedy J.

under the pavement was not a taking of the plaintiff's land but the exercise of a statutory right in the nature of an easement. If the plaintiff could establish that his property had been injuriously affected he would be entitled to compensation under s. 68 of the Lands Clauses Consolidation Act, 1845. Were our decision otherwise, the inconvenient consequence would be that a local authority must give notice to treat under s. 18 whenever, in the exercise of their statutory powers, they required to penetrate beneath the surface of a street, the subsoil of which was not vested in them. For these reasons I am of opinion that the appellants are entitled to our judgment.

Judgment for the appellants.

Solicitors for appellants: *Cole & Jackson, for A. A. Newman, Newport.*

Solicitors for respondent: *Ley, Lake & Ley, for Morgan & Co., Newport.*

W. A.

[IN THE COURT OF APPEAL.]

C. A.
1904
March 23.

In re An Arbitration between TRAAE and LENNARD & SONS, LIMITED.

Ship—Time Charter—Cessation of Payment of Hire—Detention by Ice caused by Breakdown of Steamer.

By a charterparty a steamer was chartered for about two months, to be employed on a voyage from one of certain ports in South Wales to Spain, thence to the Baltic, and back to a port in the United Kingdom or on the Continent between Bordeaux and Hamburg, at a certain sum per month. The charterparty, which contained the usual exception of perils of the sea, provided, amongst other things, that, in the event of loss of time from deficiency of men or stores, breakdown of machinery, or damage preventing the working of the vessel for more than twenty-four running hours, the payment of hire should cease until she should be again in an efficient state to resume her service, but should the vessel be driven into port, or to anchorage by stress of weather, or from any accident to cargo, such detention or loss of time should be at the charterers' risk and expense, and that "detention by ice" was "to be for account of charterers, unless caused by breakdown of steamer." The ship, while proceeding from Spain to St. Petersburg under the charter, was stranded in the Baltic, and thereby so much damaged as to be unfit to continue the voyage without repair. She put into Copenhagen for repairs, and, after the necessary repairs had been there effected, she sailed for St. Petersburg; but, on arriving at Reval, she was unable to proceed further towards St. Petersburg by reason of ice, though not herself frozen in, and was detained at Reval awaiting the breaking up of the ice at St. Petersburg. If it had not been for the damage occasioned by the stranding she could have reached St. Petersburg, discharged her cargo, and got away from that port before it was closed by ice:—

Held, that there had been a detention of the ship by ice caused by breakdown of the steamer within the meaning of the charterparty, and that the hire of the ship ceased to be payable by the charterers during that detention.

Appeal against the judgment of Ridley J. upon a special case stated by arbitrators appointed under a submission contained in a charterparty made between the appellant, acting on behalf of the owners of a steamship called the *Rikard Nordraak*, and the respondents.

By the charterparty the ship was chartered by the respondents for the term of about two calendar months from the day

C. A. 1904

TRAAE AND LENNARD & SONS, LIMITED, *In re.*

on which she was placed with a clear hold at the disposal of the charterers at Cardiff, Barry, Penarth, Newport, Swansea, or Port Talbot, as therein mentioned, to be employed on a voyage to Spain and/or Portugal, thence to the Baltic, and back to United Kingdom or the Continent, as the charterers or their agents should direct, upon the following (amongst other) conditions: (1.) that the owners should maintain the said vessel in a thoroughly efficient state in hull and machinery for and during the service; (3.) that the charterers should pay for the use and hire of the said vessel at the rate of 370*l.* per calendar month, commencing on and from the day of her delivery to charterers as aforesaid, and at and after the same rate for any part of a month used to complete a voyage; hire to continue from the time specified for terminating the charter until her delivery to owners (unless lost), in the same good order and condition as when accepted (fair wear and tear only excepted), at a port in United Kingdom or on the Continent between Bordeaux and Hamburg; (14.) that, in the event of loss of time from deficiency of men or stores, breakdown of machinery, or damage preventing the working of the vessel for more than twenty-four running hours, the payment of hire should cease until she should be again in an efficient state to resume her service; but should the vessel be driven into port or to anchorage by stress of weather, or from any accident to the cargo, such detention or loss of time should be at the charterers' risk and expense; (16.) the act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates and thieves, arrests and restraints of princes, rulers, and people, collisions, stranding, and other accidents of navigation excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners; (21.) should any dispute arise between the owners and charterers, the matter in dispute should be referred to three persons in London (lawyers excepted), one to be appointed by each of the parties thereto and the third by the two so chosen, and their decision or that of any two of them should be final and binding, and for the purpose of enforcing any award the agreement might be made a rule of Court; (26.) detention by

ice to be for account of charterers, unless caused by breakdown of steamer.

The ship was duly placed at the disposal of the charterers under the charterparty, and proceeded under the charterparty to Pomaron in Spain, where she loaded a cargo under the charterparty, for which bills of lading were signed for delivery of the said cargo at St. Petersburg. The ship sailed from Pomaron for St. Petersburg on October 19, 1902. On October 28, 1902, while in the course of the voyage to St. Petersburg, she grounded at or near Fairmunde in the Baltic, and thereby received such damage as to render her unfit to continue the voyage without repair. The captain accordingly put back to Copenhagen for repairs, where the ship arrived on or about November 1, 1902, and the necessary repairs were completed on December 20, 1902. The cargo, or part of it, had been discharged for the purpose of the repairs. It was reloaded after the repairs were completed, and the vessel sailed from Copenhagen on January 1, 1903, and arrived at Reval at the entrance of the Gulf of Finland on January 6, 1903. She put into and stayed at Reval because she was unable to proceed further towards St. Petersburg by reason of ice. She was at the date of the arbitration still at Reval, not frozen in, but awaiting the breaking up of the ice at St. Petersburg and the approaches thereto.

In these circumstances a dispute arose between the owners and the charterers under the charter as to the period for which, according to the true construction of the charter, the payment of hire should cease in consequence of the damage received by the ship by grounding as aforesaid, and whether hire was payable by the charterers under the said charter during the period of the detention of the ship at Reval.

The arbitrators found and awarded that no hire was payable by the charterers to the owners under the charter for the period from October 28, 1902, until December 20, 1902, inclusive, but that hire was payable by the charterers to the owners in respect of the period from December 20, 1902, until January 6, 1903, inclusive. They found as a fact that the port of St. Petersburg became closed by ice on November 26,

C. A. 1904

TRAAE AND LENNARD & SONS, LIMITED, *In re.*

1902, and not before, and that by reason of the ice it was practically impossible for the ship after completion of her repairs as aforesaid to get nearer to St. Petersburg than the port of Reval where she then lay. They further found as a fact that, if the ship had not grounded on October 28, 1902, and received damage as aforesaid, she could easily have reached St. Petersburg, and have discharged her cargo, and have got away from that port before November 26, 1902, and before the port was closed by ice.

In those circumstances it was contended before the arbitrators on behalf of the charterers that the detention of the ship at Reval was a detention by ice caused by breakdown of steamer, and that, according to the true construction of the charterparty, the hire ceased during the period of that detention. On the other hand, it was contended on behalf of the owners that the detention at Reval was not a detention by ice at all, or that in any case it was not a detention by ice caused by breakdown of the steamer, and that therefore the hire continued to run during the period of that detention.

If and so far as it was a question of fact, the arbitrators awarded and determined that the detention of the ship at Reval was a detention by ice caused by breakdown, and, subject to the opinion of the Court on the question thereafter submitted, they awarded and determined that the hire ceased under the charter during the period of that detention.

The question for the opinion of the Court was whether upon the facts stated in the special case, and upon the true construction of the charterparty, hire was and would be payable by the charterers to the owners under the charter during the detention of the ship at Reval awaiting the opening of the port of St. Petersburg.

Ridley J. held that the decision of the arbitrators was right and that the award must stand. He therefore gave judgment for the respondents.

Sims Williams, for the appellant. It is submitted that, upon the true construction of the charterparty, the only cases in which there is to be a cessation of payment of hire in

respect of the ship are those specifically mentioned in clause 14. Clause 26 does not contain any express provision for a cessation of the payment of hire, and the Court cannot, where the charterparty expressly mentions the cases in which the hire is to cease to be payable, imply a provision for cessation of the payment of hire in cases coming within that clause. The facts of this case do not bring it within any of the cases mentioned in clause 14, for, at the time of the detention in question, the ship was in a state of efficiency. The only provision for cessation of payment of hire is while the vessel remains inefficient through any cause mentioned in clause 14. It was, under the terms of the charter, the duty of the shipowners, when the ship was through stranding rendered unfit to proceed with the voyage, to have her repaired, and, during the repairs, the hire no doubt ceased to be payable; but, as soon as the ship was again rendered efficient, the hire became payable again. The charterers' remedy under clause 26 in respect of a detention by ice caused by breakdown of the steamer would be by way of action for damages against the shipowners; but the hire does not cease to be payable during such a detention. But it is submitted that there was no detention by ice at all, and in any case there was no detention by ice caused by breakdown of the steamer within the meaning of clause 26 of the charter. It is difficult to see how the ship could be said to be detained by ice. She was not closed in by ice at Reval. She could not get into the port of St. Petersburg, but she could have gone anywhere else. The cargo might have been unloaded and sent to St. Petersburg by rail. The detention, if any, was a consequence of the stranding, which was within the exception clause. Even if there can be said to have been a detention of the ship by ice, it was not caused by breakdown of the steamer within the meaning of the clause. The vessel at the time of the detention was not broken down, but was in a state of efficiency. "Breakdown of steamer" is not an apt term by which to describe damage caused by stranding. It is either only equivalent to breakdown of machinery, or, if it means anything more, it refers to inefficiency of the steamer arising from inherent defect or some cause arising in the

C. A. 1904

TRAAE AND LENNARD & SONS, LIMITED, *In re.*

steamer, and not to damage occasioned to the steamer by an extraneous cause coming within the exception clause. [He cited *Hogarth* v. *Miller, Brother & Co.* (1); *Havelock* v. *Geddes* (2); *Inman Steamship Co.* v. *Bischoff.* (3)]

Scrutton, K.C., and *Loehnis*, for the respondents, were not called upon to argue.

COLLINS M.R. I think this appeal must fail. It seems to me that the last clause in the charterparty means what it says. It provides that "detention by ice" is "to be for account of charterers, unless caused by breakdown of steamer"; or, in other words, that detention by ice caused by breakdown of steamer is not to be "for account of charterers," by which, I think, must be meant that the hire is not to be payable during such a detention. This steamer, in my opinion, undoubtedly broke down in consequence of stranding, and by reason of that breakdown was delayed so long that she was unable to get into the port of St. Petersburg on account of its being blocked by ice. It appears to me that there was consequently a detention by ice, which by the terms of the charter was not to be for account of the charterers. The appeal must therefore be dismissed.

ROMER L.J. and MATHEW L.J. concurred.

Appeal dismissed.

Solicitors for appellant: *Botterell & Roche.*

Solicitors for respondents: *Downing, Handcock, Middleton & Lewis.*

(1) [1891] A. C. 48.
(2) (1809–1810) 10 East, 555; 12 East, 622; 10 R. R. 380.
(3) (1882) 7 App. Cas. 670.

E. L.

HEAVER AND OTHERS *v.* BOROUGH COUNCIL OF FULHAM.

1904
March 18, 19.

Metropolis—Management Acts—Sewer—Drain—Drainage of Two Houses by Combined Operation—Order of Local Authority—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 76, 250.

In 1889 the owner of a plot of ground within the metropolitan district, on which he was about to erect a number of houses, sent to the local authority, the vestry, a plan which shewed that it was proposed to drain the houses in pairs, one pair being two houses numbered 29 and 27, but the plan did not shew any details as to the course or position of the particular drains of each house. The plan was duly passed and approved by a resolution of the vestry. In constructing the drains of Nos. 29 and 27 a connection (not shewn on the plan) was made between two gulleys at the backs of the houses, the consequence of which was that waste water from a sink in No. 27 was carried away through the pipe which drained No. 29. There was evidence that the drains of these two houses had been constructed under the supervision of a surveyor of the vestry.

By a voluntary conveyance, in the nature of a deed of family arrangement, the beneficial interest in the leases of the two houses passed from the building owner to his son, and was by him conveyed to the trustees of his marriage settlement.

A nuisance having arisen by reason of the defective condition of the drain of No. 29, it was contended by the plaintiffs, the executors of the building owner and the trustees of the son's marriage settlement, that the drain of No. 29 was a sewer repairable by the defendants, the successors of the vestry :—

Held, that the resolution of the vestry approving the plan was an order for draining the two houses by a combined operation; that it might be inferred, from the fact the plan shewed no details of the drainage, that these details were to be left to be approved by the surveyor responsible for the supervision of the work; and that the proper inference to be drawn from the evidence was that the connection between the gulley of No. 27 and the drain of No. 29 had been so approved, and that the drain of No. 29 was, therefore, not a sewer; but, *held* also, that if the connection had been wrongfully made, the plaintiffs, being the representatives of the original wrong-doer, and not being purchasers for value without notice, were estopped as against the defendants from alleging that the drain of No. 29 was a sewer.

Greater London Property Co. v. *Foot*, [1899] 1 Q. B. 972, and *Gorringe* v. *Shoreditch Borough Council*, (1902) 86 L. T. 592, distinguished.

Silles v. *Fulham Borough Council*, [1903] 1 K. B. 829, discussed.

ACTION tried by Channell J. without a jury.

The plaintiffs claimed (1.) an injunction to restrain the

1904

HEAVER v. FULHAM BOROUGH COUNCIL.

defendants from entering upon the premises of the plaintiffs, and breaking open or in any way interfering with the drains or sewers of No. 29, Rosebury Road, the property of the plaintiffs, for the purpose of converting any sewer into a drain; (2.) a declaration that the drain of No. 29, Rosebury Road, was a sewer within the Metropolis Management Acts.

The facts were as follows: In 1889 one Alfred Heaver, since deceased, was engaged in building a number of houses in Rosebury Road, Fulham, on a plot of ground, of which he was the owner. He submitted to the defendants' predecessors, the vestry of Fulham, a plan for draining the houses. The plan merely shewed that it was intended to drain the houses in pairs, of which Nos. 29 and 27 formed one pair; but the plan did not give any details shewing the position of the particular drains intended to be provided within the combined area or the course thereof. The plan, which was produced at the trial, purported on its face to have been passed by the works committee, and had been signed by the chairman of that committee; and the plan as passed by the committee had been adopted by a resolution of the vestry.

The houses were subsequently completed by Alfred Heaver, and the drains were constructed in the manner in which they were found to be when the question in dispute in this action arose. The greater part of the drainage from Nos. 29 and 27 was in the case of each house carried off by a pipe which after passing under the house met the pipe from the other house at a point just outside the forecourts of the two houses, from which point the drainage from both houses passed through one pipe into the sewer; but at the back of each of the houses was a gulley into which flowed water from a sink, and the gulley at the back of No. 27, instead of being connected with the drain of that house, was connected with the pipe which carried the water from the gulley at the back of No. 29 into the drain of No. 29, and the effect of this connection was that the drain of No. 29 carried off the sink water from the back of No. 27.

In February, 1903, complaint was made of a nuisance existing through the defective condition of the drain of No. 29. On February 20, 1903, Alfred Heaver being then dead, a notice

was served on the plaintiffs, who were his executors, under ss. 83 and 85 of the Metropolis Management Act, 1855, and under s. 64 of the Metropolis Management Act, 1862, requiring them to execute the works necessary for cleansing, altering, and amending the drain.

The plaintiffs appealed to the London County Council, on the ground that by reason of the fact that the drain of No. 29 received part of the drainage of No. 27, it was a sewer within the meaning of the Metropolis Management Acts, and was, therefore, repairable by the defendants.

When the case came before the London County Council it was adjourned sine die to enable the parties to obtain a legal decision on the question; but, the plaintiffs having taken no step to obtain a legal decision, the defendants, on July 31, 1903, served on the plaintiffs a notice under s. 83 of the Act of 1855, addressed to the "executors of Alfred Heaver and to all others whom it may concern," calling upon them to alter and reinstate the drain in question in conformity with the plan sent in in 1889, by disconnecting from the drain of No. 29 the pipe receiving the sink water from the gulley at the back of No. 27.

On October 26, 1903, the writ in this action was issued, and an interlocutory injunction was obtained by the plaintiffs ex parte restraining the defendants from acting upon the notice served in July; and the defendants subsequently gave an undertaking not to do so pending the trial of the action.

At the trial the plaintiffs obtained leave to amend their statement of claim by alleging that the rain water from the front roof of No. 31 flowed down a stackpipe on the wall of No. 29, and emptied over a gulley in the forecourt of No. 29, and flowed into the drain of No. 29, and thence into the sewer; but there was no evidence that the drain of No. 29 was out of repair at any point between this gully and the point where the drain entered the main sewer.

At the trial an amendment was also made in the parties to the action. It appeared that Alfred Heaver had, in order to create ground-rents, leased the premises for a long term to his son George Heaver in trust for himself; subsequently the

1904

HEAVER v. FULHAM BOROUGH COUNCIL.

ground-rents were sold. In 1893 the beneficial interest in the leases was transferred by a voluntary conveyance under a document entitled "Deed of Family Arrangement" to George Heaver.

In 1894 George Heaver executed a marriage settlement by which his beneficial interest in the leases was conveyed to the trustees of the settlement, one of whom was Alfred Heaver. Two of the original plaintiffs were now the trustees of that settlement, and at the trial they were added as plaintiffs in that capacity.

Evidence was given on behalf of the plaintiffs that the construction of the drains was carried out under the supervision of the surveyors of the vestry.

Boxall, *K.C.*, and *Sylvain Mayer*, for the plaintiffs. The drain of No. 29 carries off the drainage of more than one house, and it is, therefore, a sewer and repairable by the defendants, unless there was an order by the vestry for the drainage of the two houses by a combined operation: Metropolis Management Act, 1855, ss. 76, 250. There is no evidence of any order. Even if the plan can be regarded as an order, there is no evidence that the order was ever "notified" to the builder as required by s. 76 of the Act, and the absence of that notification is fatal to the existence of a scheme for combined drainage. Again, the connection of the pipe from the gulley at the back of No. 27 with the drain of No. 29 was not shewn on the plan submitted to the vestry. That connection was not authorized by the suggested order for combined drainage, and, therefore, apart from any question as to the existence of an order, the drain of No. 29 has, by reason of that connection, been converted into a sewer. Further, the fact that rain water from the roof of No. 31 flows into the stackpipe of No. 29 and thence into the drain makes the drain a sewer. On this point the facts are identical with those in *Silles* v. *Fulham Borough Council* (1), in which case the Court of Appeal affirmed *Holland* v. *Lazarus*. (2) In any event, the defendants are not entitled to proceed against the plaintiffs

(1) [1903] 1 K. B. 829. (2) (1897) 66 L. J. (Q.B.) 285.

under s. 83; they are not persons "so offending" within the meaning of that section.

Danckwerts, K.C., and *Courthope-Munroe*, for the defendants. The plan is evidence of an order sanctioning the drainage of the two houses by a combined operation: *Bateman* v. *Poplar Board of Works* (1); *Geen* v. *Newington Vestry*. (2) The fact that the drain of No. 29 carries off the sink water from No. 27 does not make it a sewer. Where an order has been made sanctioning the drainage of a block of two or more houses by a combined operation, that block of houses must for the purposes of drainage be regarded as one building, and any deviation from the plan within the combined area is immaterial, provided that the burden of drainage is not increased by the addition of drainage coming from buildings outside that area: *Greater London Property Co.* v. *Foot* (3); *Gorringe* v. *Shoreditch Borough Council*. (4) But even if there has been a deviation from the plan so as to convert the drain into a sewer, that deviation was caused by the wrongful act of Alfred Heaver; and the plaintiffs, his representatives, not being purchasers for value without notice, cannot take advantage of that wrongful act, and are estopped from asserting that the drain in question is a sewer: *Kershaw* v. *Taylor* (5); *Gorringe* v. *Shoreditch Borough Council* (4); *Butt* v. *Snow* (6); *Oliver* v. *Camberwell Borough Council*. (7)

With regard to the point about the pipe which carries off the water from the roof of No. 31, there is no evidence that a nuisance exists beyond the point of junction with the plaintiffs' drain; but, if it be necessary, it is formally submitted that *Silles* v. *Fulham Borough Council* (8) and *Holland* v. *Lazarus* (9) were wrongly decided.

Boxall, K.C., replied.

CHANNELL J. In this case the substantial question is whether a certain structure, which is part of the provision for the

(1) (1886) 33 Ch. D. 360.
(2) [1898] 2 Q. B. 1.
(3) [1899] 1 Q. B. 972.
(4) 86 L. T. 592.
(5) [1895] 2 Q. B. 471.
(6) (1903) 89 L. T. 302.
(7) (1904) 68 J. P. 165.
(8) [1903] 1 K. B. 829.
(9) 66 L. J. (Q.B.) 285.

1904

HEAVER v. FULHAM BOROUGH COUNCIL.

Channell J.

drainage of two houses, numbered 27 and 29, but which so far as it is out of repair is in the ground of No. 29, is repairable at the expense of the owners of that house or of the defendants. In order to determine that question I have to consider the old question whether the structure is a drain or a sewer. It is admitted that the structure was made substantially in its present form at the time the houses were built. It is not a case in which the thing as originally made was a drain, but which has by subsequent alterations been converted into a sewer. Consequently the question does not arise under s. 74 of the Metropolis Management Act, 1855. The order, if there was an order, which makes it a drain and not a sewer, was made under s. 76. It was proposed to build a number of houses, and the building owner, one Alfred Heaver, now dead, or some one acting for him, deposited a plan with the vestry, the then local authority. It was a plan for 115 houses, and it obviously proposed to drain the houses in pairs. The plan gave no details as to the particular drainage of each house, and in all probability the local authority might have sent it back and required that further details should be shewn on it. However, that was not done. The surveyor of the local authority reported in favour of the plan. The works committee passed it, a minute of the committee being signed by the chairman, and this was confirmed by a minute of the full vestry. According to the authorities that minute amounts to an order of the vestry within s. 74, the definitive section, for draining each pair of houses by a combined system of drainage.

The first point taken by the plaintiffs is that it has not been proved that that order was ever notified to the owner of the houses. Sect. 76 provides that drains shall be made in accordance with the order of the vestry; and that the vestry shall cause the order "to be notified to the person" intending to build; and if the drainage is made contrary to the order, then the local authority may cause the house to be demolished or may relay the drain and recover the expense of so doing. If this were a case of proceedings to demolish a house or for the recovery of expenses, it may be that specific evidence of the notification having been given might be necessary; but even

then, after a considerable lapse of time, I think any tribunal would be entitled to draw an inference from all the facts as to whether the notification had been given. Here the building owner who applied for the order is dead. The vestry apparently do not keep copies of these notifications; indeed, it may have been given verbally; and no one is able to say positively that the sanction of the vestry to the proposed plan of drainage was in fact notified to the building owner. However, he proceeded to do the drainage work, which he had no right to do otherwise, and I draw the inference and find as a fact that he was informed that the scheme of drainage shewn in the plan submitted by him had been approved by the vestry.

The houses were built and the drainage was constructed in the form in which it is now found. At the back of each of the two houses, 27 and 29, is a sink, and both these sinks are connected with the pipe which carries off the drainage of No. 29. I should mention that this is one of the details of the drainage which was not shewn on the plan submitted to the vestry. It was obviously a convenient course to adopt, because the two sinks being close together only 2 or 3 feet of pipe was required to connect the sink of 27 with the pipe of 29, instead of having to lay a length of about 30 feet of pipe right round from the back to the front of 27. But it is said that this method of construction has the effect of causing the whole of the pipe which runs under 29, and which takes nothing from 27 but the water of that particular sink, to become a sewer. Evidence was given on the part of the plaintiffs that the work was done under the superintendence of the surveyors of the vestry. One of the two surveyors was called as a witness for the defendants, but he had no recollection of the matter. Having regard to the fact that the details as to the way in which the drainage was to be constructed were omitted from the plan, and that no further plan was ever subsequently submitted to the vestry, it seems to me that the fact that the vestry gave their sanction to a plan for draining two houses in combination, which did not shew how the particular drains from each water-closet or sink were to be constructed, in itself amounts to an authority to their surveyor to deal with these matters of detail;

1904

HEAVER v. FULHAM BOROUGH COUNCIL.

Channell J.

and if the surveyor was aware of and did not object to the manner in which the pipe from the sink of No. 27 was being connected with the pipe under No. 29, I think that that is sufficient evidence for me to draw the inference that this method of construction was in fact made under the order of the vestry. If so, it follows that this structure is a drain within the definitive section, and not a sewer.

It was further contended by Mr. Danckwerts that there is authority for saying that, when once an order has been made for the drainage of two houses by a combined system, those two houses must be regarded as one house, and alterations may be made in the structure of the drainage between the two houses in the same way as if the drain were the drain of one house only. If that contention is well founded, that is an additional reason for holding that the structure in question is a drain and not a sewer. The authority for that proposition is a passage in a judgment of my own, and, therefore, if I think that I there stated the law too widely, it is my duty to say so, and not to follow it. If what I said in *Greater London Property Co.* v. *Foot* (1) can be taken to be a statement of a general proposition applicable to all cases of combined drainage, I am inclined to think it goes too far, though as regards the particular facts of that case it was quite right, because in that case the alteration in the drains was a mere deviation of the drain in part of one house, which did not have the effect of bringing in the drainage from another house in a manner different from what had been sanctioned; and in *Gorringe* v. *Shoreditch Borough Council* (2), which was also a decision of my own, I think that my observations did not go too far, if they are read in connection with the facts of that case, because there, although the drain in question came from a new building, which had been erected after the making of the order for a combined system of drainage, still that new building was in fact a part of the original premises. The facts, therefore, were not the same as in this case. I am not prepared, however, to accept the passage in my judgment in *Greater London Property Co.* v. *Foot* (1) as an authority for the general propo-

(1) [1899] 1 Q. B. 972. (2) 86 L. T. 592.

sition contended for by Mr. Danckwerts. I think that that passage ought to be confined to the facts of those two cases and ought not to be extended to a case like this, where drainage has been brought in from the neighbouring house in a manner not specifically authorized by the order of the vestry. The question in this case really is as to the meaning and effect of the plan having been approved without any details being shewn on it. In my opinion it must be regarded as an order to drain the houses in pairs, the details of the drainage to be left to be subsequently arranged by the vestry's surveyor, and it is upon that ground that my judgment, that this structure has remained a drain, is based.

But there is another view of this case, and one which raises a question of importance. Suppose that I ought to assume that the building owner did not draw the attention of the surveyor to the way in which the pipes from the two sinks were being connected, but did the work behind his back in order to save expense, how does the matter stand? It was a wrongful act on the part of the builder, and contrary to the provisions of the Act. It seems to me impossible to say that the effect of that wrongful act was to convert the structure into a sewer at that time, and to vest it in the vestry, and make it repairable at the expense, not of the owner, the wrong-doer, but of the ratepayers. I am sure that there is no authority to support that view, and I believe there is authority against it. Therefore, if the original construction of these drains was wrongful, this particular structure remained a drain during the lifetime of Alfred Heaver, the building owner. Before he died he dealt with the property, including the two houses in question, by leasing it to one of his sons in trust for himself for the purpose of enabling him to sell the freehold ground-rents. He sold the ground-rents, and at a later date gave the beneficial interest in the lease to his son George, who had originally held it as trustee. This son subsequently married, and the beneficial interest under the lease was included in his marriage settlement, and the term is now vested in the trustees of that settlement. That is the history of the title of these two houses. I am unable to see that there is anything in it to alter the

1904

HEAVER v. FULHAM BOROUGH COUNCIL.

Channell J.

position of things from what it was in the lifetime of Alfred Heaver, or to vest the structure in the local authority as a sewer. It is true that there are cases—*Kershaw* v. *Taylor* (1), for example—where the drains of two houses have been wrongfully connected, and the fact has only been discovered after the houses have been sold to different purchasers, and the Courts have decided that, as between the local authority and the innocent purchasers who were not responsible for the original wrong-doing, the structure must be regarded as a sewer. But that is the extent to which the authorities have gone. In this case the title to the two houses remained in the same person, the original wrong-doer, and only devolved upon the plaintiffs by the distribution of the property amongst the builder's own family. There has been no purchase of these houses, nor have they been divided into separate ownership. They both remain the property of persons who claim directly through the original wrong-doer, and who are possibly affected by constructive notice, one of the original trustees having been the wrong-doer himself, and, in my view, they have no greater rights than he had. Therefore, even if the original construction of this structure was wrongful—and I have already decided that it was not—I come to the conclusion that it is not open to the plaintiffs to say that as between them and the defendants it is a sewer.

It was also contended by the plaintiffs that this structure was a sewer on another ground, namely, that a pipe was connected with it which carried off rain water, not only from No. 29, but also from No. 31. It is not necessary for me to give a decision on this point because there was no evidence that the structure was out of repair at any point beyond the point of junction, but as the question has been raised I wish to say a few words about it. The pipe in question is an ordinary stackpipe belonging to No. 29, and it goes down the wall of No. 29; the rain water from the roof gutters of No. 29 is carried through it and discharged over a gully in the forecourt, whence it finds its way into the drains of No. 29 and eventually into the sewer. It appears that rain water from

(1) [1895] 2 Q. B. 471.

the roof of No. 31 flows into the gutter between the two houses, and also finds its way into this stackpipe. It is said that that makes the stackpipe a sewer, and, according to that argument, I suppose that the gutter between the two houses must also be said to be a sewer. The case of *Silles* v. *Fulham Borough Council* (1), a decision of the Court of Appeal, is relied on in support of this contention, and when the facts of that case are looked at they do appear to afford some sort of authority for the proposition; but if the case is carefully examined, I think it will be found that the Court never intended to decide that proposition, which certainly, to my mind, is a ridiculous one. *Silles* v. *Fulham Borough Council* (1) was apparently argued and decided on the footing that it was to be treated as an appeal from *Holland* v. *Lazarus* (2), and all that the Court really decided was that the decision in *Holland* v. *Lazarus* (2) was right. The only point argued and decided in *Holland* v. *Lazarus* (2) was as to whether a pipe carrying off rain water only, as distinct from sewage in the ordinary meaning of the word, was a drain in the sense that the unauthorized connection of a drain, into which flowed rain water from a stackpipe, with the drain of another house converted the latter into a sewer. Bruce J. held that it was, and the Court of Appeal in *Silles* v. *Fulham Borough Council* (1) held that he was right; but the attention of the Court in the latter case does not appear to have been drawn to the fact that the facts there were entirely different from those of *Holland* v. *Lazarus*. (2) If that had been made clear, I feel sure that the Court would have found some way of distinguishing the two cases, of dealing with the proposition that a gutter between the roofs of two houses is a sewer vested in the local authority, and would not have decided it in the way which the present plaintiffs contend for. But there is not a word in the arguments or judgments in *Silles* v. *Fulham Borough Council* (1), as reported, to shew that the members of the Court had noticed that the stackpipe in question there was a stackpipe on the wall of one house and part of the structure, in the ordinary sense, of that house, which merely took the drainage from the

(1) [1903] 1 K. B. 829. (2) 66 L. J. (Q.B.) 285.

1904

HEAVER v. FULHAM BOROUGH COUNCIL.

Channell J.

other house because it happened to be rain water coming off the roof.

I now come to another question altogether. A dispute having arisen between the parties as to who was liable to remedy the nuisance, the matter was brought before the London County Council; but as it appeared that the question was really one of law, namely, whether the structure was a drain or sewer, the county council said that they could not deal with it. Then the defendants, desiring to get the matter disposed of, served a notice under s. 83 of the Metropolis Management Act, 1855, which deals with the case of a drain which has not been made in accordance with the directions of the vestry, and the section provides that the "person so offending" shall forfeit 10*l*., and the vestry is empowered after notice to cause the necessary work to be done, and to recover the expense from the person who has so offended. That section only applies if the party offending can be found. If Alfred Heaver were still alive and it were proved that he had done the work wrongfully, he might have been summoned under the section and fined. But I think that the plaintiffs are right in their contention that they are not persons offending within the meaning of the section. Consequently the notice which was addressed to the executors of Alfred Heaver and all others whom it might concern was a wrong proceeding on the part of the local authority.

This action was subsequently commenced. In the first instance the plaintiffs were the executors of Alfred Heaver, and afterwards, at the trial, an amendment was made by which two of the plaintiffs, who were the trustees of the marriage settlement of the son of Alfred Heaver, were made additional plaintiffs in that capacity.

The plaintiffs ask for an injunction to restrain the defendants from acting on the notice, and the defendants have now given an undertaking not to do so. Secondly, the plaintiffs ask for a declaration as to whether the structure in question is a drain, or a sewer repairable by the defendants; and I accordingly make a declaration that the structure, down to the point where the rain-water pipe joins it, is a drain.

I say nothing one way or the other as to what it is beyond that point.

Judgment accordingly.

1904

HEAVER v. FULHAM BOROUGH COUNCIL.

Solicitors for plaintiffs: *W. W. Young, Son & Ward.*
Solicitor for defendants: *R. M. Prescott.*

F. O. R.

THE GUARDIANS OF THE TEWKESBURY UNION, APPELLANTS *v.* THE GUARDIANS OF BIRMINGHAM, RESPONDENTS.

1904 *May* 6.

Poor Law—Settlement—Irremovability—Residence for One Year—Husband and Wife—Departure of Husband—Animus Revertendi—Residence of Wife before and after Departure of Husband—Poor Removal Act, 1846 (9 & 10 *Vict. c.* 66), *s.* 1—*Poor Removal Act*, 1848 (11 & 12 *Vict. c.* 111), *s.* 1—*Union Chargeability Act*, 1865 (28 & 29 *Vict. c.* 79), *s.* 8—*Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.

By s. 1 of the Poor Removal Act, 1846, as amended by s. 8 of the Union Chargeability Act, 1865, no person shall be removed from any parish in which such person shall have resided for one year next before the application for the warrant for removal.

A married woman resided in a parish for part of a year with her husband, a foreigner having no settlement. The husband then went abroad intending to return. The wife continued to reside with her children in the parish for the remainder of the year, after the expiration of which, during her husband's absence, she became chargeable to the parish:—

Held, that the married woman could not be removed from the parish.

Reg. v. *St. George-in-the-East*, (1870) L. R. 5 Q. B. 364, followed.

Guardians of Medway Union v. *Guardians of Bedminster Union*, (1889) 14 App. Cas. 465, distinguished.

CASE stated by the Recorder of Birmingham, on appeal to the quarter sessions of the city of Birmingham from an order of justices dated September 3, 1902, for the removal from the parish of Birmingham to the parish of Bredon, in the Tewkesbury Union, of a pauper named Alice Alinquvist and her four children.

The Recorder allowed the appeal subject to a special case, in which the following facts appeared:—

The pauper was born in 1869 the lawful daughter of Robert

1904

TEWKESBURY UNION v. BIRMINGHAM UNION.

Warner who in the year 1885, when the pauper had attained the age of sixteen years, had acquired a settlement by residence in the parish of Bredon, in the Tewkesbury Union.

On July 6, 1890, the pauper was married to Charles Alinquvist, a foreigner with no settlement of his own. There were four children lawfully born of the marriage; the eldest was born in August, 1892, at New York, the second in January, 1898, in the parish of West Bromwich, in the West Bromwich Union, the third in October, 1899, in the parish of West Bromwich, and the fourth at Birmingham, as hereinafter stated.

In January, 1901, the pauper and her husband came to reside in the parish of Birmingham, and continued to reside in that parish, first at No. 99, Buckingham Street, and then at No. 2, Bath Street, until June 20, 1901. On that date the husband went to America to get work, intending to return and not intending to desert his wife.

From June 20, 1901, the pauper and her three children continued to reside at No. 2, Bath Street, in the parish of Birmingham, until March 27, 1902. She then removed with them to the Birmingham Workhouse, where she gave birth to her fourth child on April 26, 1902. She remained in the workhouse till September 19, and then left it with all her children.

On September 3, 1902, during the absence in America of the pauper's husband, the guardians of the parish of Birmingham obtained from justices an order for the removal of the pauper and her four children from the parish of Birmingham to the parish of Bredon, in the Tewkesbury Union.

On appeal from this order to the Court of quarter sessions for the city of Birmingham, the Recorder held that the pauper was, by virtue of s. 1 of the Poor Removal Act, 1846 (9 & 10 Vict. c. 66), as amended by s. 8 of the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79) (1), irremovable from the parish

(1) Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 1: "From and after the passing of this Act no person shall be removed nor shall any warrant be granted for the removal of any person from any parish in which such person shall have resided for five years" [now one year by the Union Charge-

of Birmingham by reason of her continuous residence there for more than one year up to the date of the order of removal. He also held that s. 35 of the Divided Parishes Act, 1876 (1), was a bar to the acquisition by the pauper of any derivative settlement from her father, or from anybody but her husband, and that as the husband had no settlement she could not derive any settlement from him. The Recorder, therefore, held that neither the alleged settlement of the pauper nor that of her children had been made out, and allowed the appeal and quashed the order of removal, subject to the following questions:—

(1.) Was the pauper Alice Alinquvist at the time of the order of removal irremovable from the parish of Birmingham?

(2.) If not, was the pauper Alice Alinquvist, or were any of her children properly removable to the Tewkesbury Union?

Pritchett (*Macmorran, K.C.*, with him), for the guardians of Birmingham. The pauper has not resided for one year in the parish of Birmingham so as to become irremovable. The

ability Act, 1865 (28 & 29 Vict. c. 79), s. 8] "next before the application for the warrant."

Poor Removal Act, 1848 (11 & 12 Vict. c. 111). After reciting the Poor Removal Act, 1846, s. 1, at length, it is by

Sect. 1: "Provided always that whenever any person shall have a wife or children having no other settlement than his or her own, such wife and children shall be removable from any parish or place from which he or she would be removable notwithstanding any provisions of the said recited Act, and shall not be removable from any parish or place from which he or she would not be removable by reason of any provision in the said recited Act."

(1) Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), s. 35: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another. If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

1904

TEWKESBURY UNION v. BIRMINGHAM UNION.

time during which she was residing with her husband cannot be taken into account. The question is as to the meaning of the words "no person" in s. 1 of the Poor Removal Act, 1846, as amended by s. 8 of the Union Chargeability Act, 1865. The word "person" must mean a person sui juris and capable of acquiring a settlement or status of irremovability for himself, and does not include a woman under coverture. That was the view taken by Lopes L.J. in *Guardians of Medway Union* v. *Guardians of Bedminster Union* (1), and affirmed in the House of Lords on appeal (2), as to the meaning of the words "any person" in s. 34 of the Divided Parishes Act, 1876. While the husband lives with his wife his residence only, and not his wife's, must be looked to, and his status of irremovability, not hers. It is not the residence of the wife which renders her irremovable; it is the residence of the husband. She can do nothing to acquire a status of irremovability in her own right, but her status follows and changes with his: *Guardians of Medway Union* v. *Guardians of Bedminster Union* (3), per Lopes L.J. From January to June 20, 1901, the husband was by his residence in the parish of Birmingham acquiring a status of irremovability, which would have been acquired under s. 1 of the Poor Removal Act, 1846, as amended by s. 8 of the Union Chargeability Act, 1865, and would have made the pauper irremovable under the proviso enacted by s. 1 of the Poor Removal Act, 1848, if the husband's residence had continued until January, 1902. But his residence was broken in June, 1901. He never acquired the status of irremovability. The break in his residence was a break in her residence: *Reg.* v. *Overseers of Manchester* (4); *Reg.* v. *St. Marylebone* (5); consequently the pauper is not irremovable.

[KENNEDY J. referred to *Reg.* v. *St. George-in-the-East.* (6)]

The principle of that case and of *Reg.* v. *Glossop* (7), upon which it is based, is inconsistent with the reasoning of Lopes L.J. in *Guardians of Medway Union* v. *Guardians of*

(1) (1888) 21 Q. B. D. 278.
(2) 14 App. Cas. 465, at p. 487.
(3) 21 Q. B. D. at p. 283.
(4) (1881) 8 Q. B. D. 50.
(5) (1851) 16 Q. B. 352.
(6) L. R. 5 Q. B. 364.
(7) (1848) 12 Q. B. 117.

Bedminster Union (1), approved by the House of Lords (2), and must, therefore, be considered as overruled.

Then, the pauper being removable, the question is where she is to be removed to. Not to her husband's settlement, because he had none. Then it must be to her maiden settlement: *Rex.* v. *Ryton* (3); *Reg.* v. *St. Marylebone.* (4) The Recorder held that the maiden settlement was a derivative settlement, and that by s. 35 of the Divided Parishes Act, 1876, the pauper could not acquire a derivative settlement except from her husband; and that as he had no settlement she could take no derivative settlement from him, and therefore had no settlement and must remain in the parish of Birmingham. The reasoning of *Reg.* v. *Guardians of Bridgnorth* (5), that the date of the order of removal is the time which governs the question of settlement, might justify that holding; but the reasoning of *Reg.* v. *Guardians of Bridgnorth* (5) has been overruled by *Guardians of Reigate Union* v. *Guardians of Croydon Union.* (6) The result is that the pauper acquired a settlement, derivative it may be, in the Tewkesbury Union as a child under the age of sixteen, and retains that settlement until she acquires another: Divided Parishes Act, 1876, s. 35; *Guardians of Dorchester Union* v. *Guardians of Poplar Union.* (7) She never acquired any other; therefore she is settled in the Tewkesbury Union, and, not being irremovable from Birmingham, she was rightly ordered to be removed to the Tewkesbury Union.

As to the children, the three younger children being within the age of nurture must follow their mother. The eldest is above the age of nurture but under the age of sixteen. By s. 1 of the Poor Removal Act, 1848, this child is removable or irremovable according as the pauper is removable or irremovable. It is said that s. 35 of the Divided Parishes Act, 1876, has altered this; but that is not the effect of the later enactment. It leaves the law as it was with regard to children

(1) 21 Q. B. D. 278.
(2) 14 App. Cas. 465.
(3) (1778) Cald. 39.
(4) 16 Q. B. 352.
(5) (1883) 11 Q. B. D. 314.
(6) 14 App. Cas. 465.
(7) (1888) 21 Q. B. D. 88.

1904

TEWKESBURY UNION v. BIRMINGHAM UNION.

under the age of sixteen, except where the father or widowed mother of the child has a settlement. In those cases the child takes the settlement of its father or widowed mother, as the case may be; but where the father has no settlement and the mother is not a widow the law remains as it was before. This view is countenanced by Lord Esher M.R. in *Guardians of Mitford and Launditch Union* v. *Guardians of Wayland Union* (1), and by Lord Watson and Lord Macnaghten in *Guardians of Reigate Union* v. *Guardians of Croydon Union*. (2) The result is that the eldest child also must follow its mother to the Tewkesbury Union.

R. Cunningham Glen, for guardians of the Tewkesbury Union. There is no question here as to the settlement of the pauper, Alice Alinquvist. The only question is whether she can be removed from Birmingham. Sect. 35 of the Divided Parishes Act, 1876, does not touch that question, which turns exclusively upon the meaning of s. 1 of the Poor Removal Act, 1846, with the proviso thereto enacted by s. 1 of the Poor Removal Act, 1848. That enactment provides that whenever any person should have a wife or children having no other settlement than his own, such wife and children should not be removable from any parish from which he would not be removable. That is a statutory prohibition against removing the wife, who has no other settlement than her husband's, from any parish from which the husband would not be removable. A wife who is not deserted by her husband has no other settlement than his within the meaning of this enactment. The pauper in this case answers that description. There having been a primâ facie disruption of residence by the husband, the onus lay upon the Tewkesbury guardians to establish an animus revertendi: *Reg.* v. *Inhabitants of Llanelly*. (3) They have discharged this onus. Consequently the only question is, Can the husband be removed from Birmingham? It is clear he cannot. Neither, therefore, can the pauper.

But, secondly, if not within s. 1 of the Poor Removal Act, 1848, the pauper is within the principal enactment of s. 1

(1) (1890) 25 Q. B. D. 164, at p. 171.

(2) 14 App. Cas. at pp. 484, 490.

(3) (1851) 17 Q. B. 40.

of the Poor Removal Act, 1846, as amended by the Union Chargeability Act, 1865, that no person shall be removed from any parish in which such person shall have resided for one year next before the application for the warrant to remove. That enactment is quite general in its terms. It does not say that the residence must be in the same capacity during the entire year. *West Ham Union* v. *Holbeach Union* (1), in which the decision of this Court has lately been affirmed in the Court of Appeal (2), favours this view. In that case a period of residence for three years was held to confer on an illegitimate child a settlement in its own right, although during the whole period the child, being under the age of sixteen years, had a derivative settlement from its mother. It would follow that, to complete the necessary three years, a portion during which a child had a derivative settlement might be added to a portion during which it was acquiring another settlement. On the analogy of that case a period of residence for one year necessary to confer a status of irremovability might be made up of six months' residence in one capacity, e.g., as a wife living with her husband, and six months after his departure. In that view the pauper has resided in the appellants' parish for one year, and, therefore, shall not be removed therefrom: Poor Removal Act, 1846, s. 1; Union Chargeability Act, 1865, s. 8.

The real question in this case admittedly is whether *Reg.* v. *St. George-in-the-East* (3) has been overruled. If not, the words of Blackburn J. cover this case. "If he"—i.e., the husband—"had a settlement no doubt the wife would be removable to his place of settlement. But I am at a loss to see in that any foundation for the argument that (the husband being irremovable in point of fact if he were here with his wife, because he has no settlement), he not being here, you are to send the wife—notwithstanding her long residence—away from her husband's and her own place of residence to her place of settlement, merely because he has not resided a year." It is said that that case has been overruled; but in *Guardians of*

(1) [1903] 2 K. B. 627. (2) Ante, p. 121.
(3) L. R. 5 Q. B. 364.

1904

TEWKESBURY UNION v. BIRMINGHAM UNION.

Medway Union v. *Guardians of Bedminster Union* (1) the husband had a settlement of his own. This is not so here. In *Reg.* v. *Overseers of Manchester* (2), if the husband had returned after the break in his residence he could have been removed, which is not so here. *Reg.* v. *St. George-in-the-East* (3) has been cited with approval in *Reg.* v. *St. Olaves.* (4)

Macmorran, K.C., in reply. This pauper is not within the proviso to s. 1 of the Poor Removal Act, 1846, enacted by s. 1 of the Poor Removal Act, 1848. That proviso enacts that a wife shall not be removable from any parish from which the husband would not be removable by reason of any provision in the Poor Removal Act, 1846—that is to say, by reason of having acquired a status of irremovability by residence in the parish for five years, or, as the law now stands, for one year: Union Chargeability Act, 1865, s. 8. A man may not be removable for two reasons: first, because he has acquired a status of irremovability; secondly, merely because, though he has acquired no such status, there is no place to which he can lawfully be removed. The word removable is used in the first and not in the second sense in s. 1 of the Poor Removal Act, 1848: *Reg.* v. *St. Ebbe's* (5); *Reg.* v. *Guardians of Kingston Union* (6); *Much Hoole* v. *Preston* (7), cited with approval in *Guardians of Poor of West Ham Union* v. *Churchwardens of St. Matthew, Bethnal Green.* (8) The argument for the Tewkesbury guardians in the present case is identical with that urged unsuccessfully in *Reg.* v. *St. Marylebone.* (9)

LORD ALVERSTONE C.J. I am of opinion that the decision of the learned Recorder was right, and substantially for the reasons given by him. Counsel for the Birmingham guardians in his able argument endeavoured to shew that the principles of several of the cases cited by him are inconsistent with *Guardians of Medway Union* v. *Guardians of Bedminster*

(1) 14 App. Cas. 465.
(2) 8 Q. B. D. 50.
(3) L. R. 5 Q. B. 364.
(4) (1873) L. R. 9 Q. B. 38.
(5) (1848) 12 Q. B. 137.
(6) (1869) 21 L. T. 488.
(7) (1851) 17 Q. B. 548.
(8) [1894] A. C. 230. See also *Reg.* v. *Inhabitants of East Stonehouse*, (1854) 3 E. & B. 596.
(9) 16 Q. B. 352.

1904

TEWKESBURY UNION v. BIRMINGHAM UNION.

Lord Alverstone C.J.

Union (1), and in my opinion he is quite justified in saying that it is extremely difficult to lay down any rule which is consistent with all the cases.

In my opinion we are not compelled to hold that the period during which a wife is living with her husband can never be considered in determining the question whether she has acquired a settlement or status of irremovability in her own right. I do not think any case has gone so far as to decide that that period can under no circumstances be considered. Lopes L.J. in *Guardians of Medway Union* v. *Guardians of Bedminster Union* (2) did not so decide. The Lord Justice was pointing out that the wife in that case ought to be held to have acquired a derivative settlement through her husband, and on that account, and it may be only on that account, could not acquire a settlement in her own right. The acquisition of a subsisting derivative settlement was the important point in that judgment. To a certain extent the decision of this Court in *West Ham Union* v. *Holbeach Union* (3), which has lately been affirmed by the Court of Appeal (4), gives an indication that the principle ascribed to Lopes L.J. in *Guardians of Medway Union* v. *Guardians of Bedminster Union* (2) is not to be applied with that strictness of application which Mr. Pritchett claims for it. If it be true that the period during which a woman is married has no value whatever except for the purpose of conferring upon her a derivative settlement through her husband, it seems to me that it might with equal force have been contended that the time, during which an illegitimate child is under the age of sixteen years and has a derivative settlement through its mother, can have no effect in conferring upon the child in its own right a settlement by residence. But that argument did not prevail in *West Ham Union* v. *Holbeach Union*. (4)

The short point upon which I decide this case is that, as the learned Recorder has rightly said, the principle laid down by Blackburn J. in *Reg.* v. *St. George-in-the-East* (5) governs this

(1) 14 App. Cas. 465.
(2) 21 Q. B. D. 278.
(3) [1903] 2 K. B. 627.
(4) Ante, p. 121.
(5) L. R. 5 Q. B. 364.

1904

TEWKESBURY UNION v. BIRMINGHAM UNION.

Lord Alverstone C.J.

case. That case has not been even indirectly—it certainly has not been directly—overruled in the House of Lords in *Guardians of Medway Union* v. *Guardians of Bedminster Union*. (1) It is not referred to in any of the judgments in the House of Lords, and I can see nothing, so far as material to the present discussion, inconsistent in the two cases. The question before Blackburn J. arose upon the statute which we have to consider affecting the removability of a wife left, but not deserted, by her husband. When the husband has left the wife under circumstances which lead to the finding of fact that they indicate an intention of returning, and that the departure does not amount to desertion, and the husband cannot be removed—I purposely use this phrase so as not to confine myself to the case where the husband has acquired the status of irremovability—I think Blackburn J. points out very good reasons why the wife, who has in fact resided long enough to become irremovable, should not be removed. His reasoning appears to me conclusive, and I adopt it and apply it to the present case. Had the husband been here he could not have been removed either before or after January, 1902. Of course, if he had resided in the parish of Birmingham for twelve months the judgment of Lopes L.J. in *Guardians of Medway Union* v. *Guardians of Bedminster Union* (2) would have applied directly. The husband would then have acquired the status of irremovability, and the wife would have been irremovable by virtue of his irremovability. That being so, we ought not without very clear language to hold that in a case so similar, where the husband has merely gone away with the intention of returning, and where upon his return he could not be removed, the wife is to be removed to her maiden settlement, although she has in fact completed her twelve months' residence in the parish from which her husband on his return could not be removed. Then as to the language of this legislation, I think the wife does not come within either the original proviso to s. 1 of the Poor Removal Act, 1846, or the enactment contained in s. 1 of the Poor Removal Act, 1848, which replaces that proviso. If the effect of the later enact-

(1) 14 App. Cas. 465. (2) 21 Q. B. D. 278.

1904

TEWKESBURY UNION v. BIRMINGHAM UNION.

Lord Alverstone C.J.

ment is that mere de facto irremovability of the husband precludes removal of the wife, this case is clear and simple; but I am certainly not prepared to say that that is the effect of this enactment. I fully share the difficulty which Blackburn J. felt in construing it. It is only necessary to decide that this pauper comes within the language of the principal enactment of s. 1 of the Poor Removal Act, 1846, as amended by s. 8 of the Union Chargeability Act, 1865, and not within the terms of s. 1 of the Poor Removal Act, 1848. She is a person who has resided for one year in the parish of Birmingham. That being so, she cannot be removed, unless it is necessary to hold that the time during which she was living with her husband cannot be considered. There are no words in the enactment which make it necessary to adopt that view; and the contention of those who seek to remove her fails on the principle laid down by Blackburn J. in *Reg.* v. *St. George-in-the-East* (1), that where the wife has in fact resided sufficiently long to acquire the status of irremovability, and the husband, who has not deserted his wife, cannot be removed, whether from having acquired the status of irremovability or from there being no circumstances to make him removable—the result for the present purpose is the same—the wife cannot be removed. For these reasons I think the learned Recorder was right, and this appeal must be dismissed.

WILLS J. I have come to the same conclusion. It was admitted by counsel for the Birmingham guardians in his able argument that unless *Reg.* v. *St. George-in-the-East* (1) is overruled it governs this case. It is said to be overruled by *Guardians of Medway Union* v. *Guardians of Bedminster Union* (2) because the reasoning in the former case was founded partly on *Reg.* v. *Glossop* (3) and to a certain extent followed the same lines, and the train of reasoning by which the decision in *Reg.* v. *Glossop* (3) was arrived at, though not the decision itself, had been overruled by the House of Lords. If I thought that *Reg.* v. *St. George-in-the-East* (1) had been

(1) L. R. 5 Q. B. 364. (2) 14 App. Cas. 465.
(3) 12 Q. B. 117.

1904

TEWKESBURY UNION v. BIRMINGHAM UNION.

Wills J.

overruled by the House of Lords, of course I should consider it no longer an authority; but the decision of the House of Lords does not go that length. The House of Lords disagreed with the view of the majority of the Court of Appeal, and adopted that of Lopes L.J., which, as explained by Lord Watson, was that where a wife has a derivative settlement from her husband she has no capacity to acquire by residence another settlement in the same parish. That has no bearing upon the present case, which is not a case where the wife has a subsisting derivative settlement through her husband, and therefore the view entertained by the House of Lords with regard to *Reg.* v. *Glossop* (1) does not touch the facts of this case. Of course, there is a material difference between the case where a wife has a derivative settlement by reason of her husband's settlement and the case where a wife has no such settlement by reason of her husband having no settlement. Under these circumstances we are driven to look at the very words of the Poor Removal Act, 1846, as amended by the Union Chargeability Act, 1865: those words are that no person shall be removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have resided for one year next before the application of the warrant. It is true that in one sense there is a difference between her residence before and her residence after her husband goes away; after he goes away he himself has broken his residence, and if he goes away before having resided for twelve months she cannot tack the two periods of residence together for the purpose of claiming to be irremovable because of any status of irremovability acquired by her husband, for the simple reason that, having broken the residence within twelve months, he never acquired that status. But there is no decision, and I see no reason for making a decision, to prevent a wife from tacking the residence during which, by reason of her husband having no settlement, she has acquired no settlement to her residence after her husband goes away. That is not like the case of a wife who becomes a widow, and who, according to

(1) 12 Q. B. 117.

the decision of *Guardians of Medway Union* v. *Guardians of Bedminster Union* (1), cannot for the purpose of acquiring a settlement by residence tack the period of residence during which she had a derivative settlement as wife to the period of residence as a widow. The two cases are not analogous, and, there being no decision which binds us to hold that the pauper in this case has not resided for the period of twelve months, it is better to follow the language of the Act and to hold that she has resided for the necessary period. The late decision in *West Ham Union* v. *Holbeach Union* (2) is not without its bearing upon this matter, for it decides that to complete the residence necessary to confer a status of irremovability a period of residence during which a child had a derivative settlement through its mother might be taken into account; from which it would seem to follow that the necessary period might be made up of two portions, the residence being under a different capacity during each portion. And, as there is no express enactment or decision which militates against this view, I think the residence may be considered as complete for the purpose of conferring the privilege of irremovability within the terms of the Act. I prefer to base my judgment upon this ground, because I feel that there may be a difference between the irremovability of a person who cannot be removed merely because there is no place to which he can legally be removed, and that of a person who cannot be removed because he has acquired the status of irremovability by reason of residence in one place, notwithstanding that there is another place to which otherwise he could be removed.

KENNEDY J. I am of the same opinion upon the facts, which are important and are found thus. The pauper is the wife of a man who has no settlement of his own; the man has left her temporarily, not deserting her, but with the intention of returning, and therefore he is in one sense to be treated as still residing where he was before his departure, in the parish of Birmingham; the pauper with her children had, before she

(1) 14 App. Cas. 465. (2) [1903] 2 K. B. 627; affirmed ante, p. 121.

1904

TEWKESBURY UNION v. BIRMINGHAM UNION.

Kennedy J.

became chargeable, resided in that parish for the statutory period which would confer upon her the status of irremovability if she could be treated as an independent personality. Under these circumstances, is she with her children, on becoming chargeable, to be taken away to her maiden settlement at Tewkesbury, which is the settlement of her father and which she has acquired through him, or is she to be treated as chargeable to the parish of Birmingham? Now there are two important principles in this complex legislation: not to separate wife from husband; and not to separate children from parents. It may be assumed that the Legislature has not consciously enacted anything in violation of those governing principles, where it was possible to avoid so doing. But if this pauper is to be removed to the place of her maiden settlement there is at the least a grave question as to whether the children can follow her, and she will certainly be separated from her husband. If the husband had a settlement there would be no difficulty: his settlement would be his wife's also. But where the husband has no settlement, what happens? That question is answered by Blackburn J. in *Reg.* v. *St. George-in-the-East.* (1) There is no flaw to be found in the judgment in that case. Mr. Pritchett in his able argument for the Birmingham guardians admitted that unless that judgment could be treated as overruled the decision of the learned Recorder in this case must stand. But it was contended that the judgment of Blackburn J. in *Reg.* v. *St. George-in-the-East* (1) must be treated as overruled by several cases, and finally by the judgment of Lord Watson and the ratio decidendi of the House of Lords in *Guardians of Medway Union* v. *Guardians of Bedminster Union.* (2) I differ entirely from that view. I can see no indication that the case of *Reg.* v. *St. George-in-the-East* (1) has been directly or indirectly overruled in any of the cases, including that in the House of Lords. On the contrary, Lord Watson's affirmance of the view of Lopes L.J. in the Court of Appeal (3) turns upon the cardinal fact, absent in this case,

(1) L. R. 5 Q. B. 364. (2) 14 App. Cas. 465.
(3) 21 Q. B. D. 278.

that the husband had a settlement. Where that is so, the wife follows her husband's settlement; but that is not so here.

Then has the Act of 1876 modified the law as stated by Blackburn J., or the conclusions he drew therefrom? That is not seriously suggested. So far as the case of husband and wife is concerned no legislation has affected the statement of the law upon which Blackburn J. based his judgment, the only position which is reasonably consistent with the great object of keeping the family together, subject to this qualification, expressly stated by the learned judge himself, that if the husband has a settlement of his own the wife must follow his settlement.

Appeal dismissed.

Solicitors for appellants: *Redfern & Hunt, for Redfern & Son, Birmingham.*

Solicitors for respondents: *Sims, Gribble & Co., for Brookes & Badham, Tewkesbury.*

W. A.

C. A.
1904
April 28, 29.

[IN THE COURT OF APPEAL.]

OGDENS, LIMITED *v.* NELSON.
THE SAME *v.* TELFORD.

Contract—Construction—Implied Term—Necessary Implication.

By a contract made between the plaintiffs, who were wholesale dealers in tobacco, and the defendant, a retail tobacconist, it was agreed that, in consideration of the defendant undertaking to become a customer of the plaintiffs and to purchase goods direct from them, and not to sign any agreement with any other firm in the tobacco trade which would prevent him from dealing with the plaintiffs, the plaintiffs would for the next four years distribute as an annual bonus among their customers, including the defendant, and in proportion to the purchases made by them respectively, a certain fixed annual sum, and also the expected net profits on goods sold by the plaintiffs in the United Kingdom during that period. Before the four years had expired the plaintiffs sold their business to third persons. In an action for the price of goods sold to him the defendant counter-claimed against the plaintiffs for damages for breach of the contract :—

Held, that upon the true construction of the contract there was an absolute undertaking on the part of the plaintiffs to distribute for a period of four years among their customers the fixed annual sum and expected net profits, and that a term must necessarily be implied that the plaintiffs would not during that period do any act which would put it out of their power to carry out their contract to distribute these sums, and that the defendant was entitled to damages.

APPEAL from a decision of Lord Alverstone C.J., after trial without a jury. (1) The following statement of facts is taken from the judgment of the Lord Chief Justice.

These were two actions brought by Ogdens, Limited, a company in liquidation, to recover certain amounts due for goods supplied to the defendants, Nelson and Telford, respectively. No question arises as to the plaintiffs' claims, which were admitted. The point for decision arises solely upon the counter-claims, which were set up under the following circumstances. Prior to the month of March, 1902, there had been considerable agitation in the retail tobacco trade respecting an

(1) [1903] 2 K. B. 287.

alleged attempt to obtain control of the retail tobacco trade in the United Kingdom. This agitation led to the formation of a company called the Imperial Tobacco Company of Great Britain and Ireland, Limited, which had offered to various tobacco dealers, including the defendants, in consideration of their selling the goods of the company and undertaking not to buy any goods of the plaintiffs and certain other companies, a share in a bonus of 50,000*l.* and a share in certain expected profits of the Imperial Tobacco Company. The offers of the Imperial Tobacco Company led to a counter-offer by the plaintiff company, which counter-offer was accepted by the defendants, and the offer and acceptance constitute the agreement in respect of which the counter-claim was made. The offer of the plaintiffs was contained in the following letters :—

Stamp 6*d.*

"Liverpool,
"March, 1902.

"*Bonus Distribution.*

"Our entire net profits and two hundred thousand pounds per year for the next four years.

"Commencing April 2, 1902, we will for the next four years distribute to such of our customers in the United Kingdom as purchase direct from us our entire net profits on the goods sold by us in the United Kingdom.

"In addition to the above we will, commencing April 2, 1902, for the next four years distribute to such of our customers in the United Kingdom as purchase direct from us the sum of two hundred thousand pounds per year.

"Distribution of net profits will be made as soon after April 2, 1903, and annually thereafter, as the accounts can be audited, and will be in proportion to the purchases made during the year.

"Distribution as to the two hundred thousand pounds per year will be made every three months, the first distribution to take place as soon after July 2, 1902, as accounts can be audited, and will be in proportion to the purchases during the three months' period.

C. A. 1904

OGDENS, LIMITED v. NELSON. THE SAME v. TELFORD.

"To participate in this offer we do not ask you to boycott the goods of any other manufacturer.

"Yours, &c.,
"Ogdens, Limited."

Stamp 6*d*.

"Messrs. Ogdens, Limited, "22 March, 1902.
"Liverpool.

"Dear Sirs,—I beg to inform you that I have not signed the agreement with the Imperial Tobacco Company, Limited, dated March, 1902, and in consideration of participating in your bonus distribution of the entire net profits on goods sold by you in the United Kingdom and two hundred thousand pounds per year for the next four years as set out in your particulars, I hereby agree not to sign it or any similar agreement with the Imperial Tobacco Company, Limited, or any other company or firm containing any conditions which would prevent me from buying, displaying, selling, or distributing your goods or the goods of any other manufacturer, and I also undertake to continue to buy, display, and sell your goods.

"Yours, &c.,
"(Name) E. Nelson.
"(Witness) "(Address) 100, Queen Street.
"M. Winstone, "(Town) Cardiff."
"100, Queen Street,
"Cardiff."

It was agreed that the contract between the plaintiffs and Telford, which forms the subject of the counter-claim in the other action, was the same.

Pursuant to the bargain so made, the defendants dealt with the plaintiffs respectively, and in the month of July, 1902, they each received a share of the 50,000*l*., being one quarter of the 200,000*l*. for the three months ending June 30, 1902. On September 27, 1902, the plaintiffs sold their undertaking, including the goodwill of their business in Great Britain, to the Imperial Tobacco Company. The agreement was put in at the trial. The consideration was the sum of 1,500,000*l*. in shares, and certain stock, plant, and buildings at a valuation.

The amount due to the defendants as their share of the second 50,000*l.* bonus, in respect of the three months ending September 30, was allowed by the plaintiffs in account, and no question arises respecting that.

It was agreed that no profits had been made by the plaintiffs in the six months ending September 30, 1902, so that no claim was made under that head. The defendants did not ask for any account of profits due to them under the agreement up to the time of sale of the plaintiffs' business to the Imperial Tobacco Company. The defendants' real claim was for damages in respect of the alleged breach by the plaintiffs of the contract contained in the letters hereinbefore set out, by reason of their having transferred their trading undertaking to the Imperial Tobacco Company, thereby preventing themselves from being in a position to earn profits and preventing the defendants from continuing as their customers, and it was further alleged that the plaintiffs, having received consideration to the amount of 1,500,000*l.* for assets, including their goodwill, had in fact sold their business to third parties, and were liable for damages for having deprived themselves of the ability to carry out their agreement. It was argued on behalf of the defendants that either the plaintiffs had wilfully prevented themselves from fulfilling their contract, or that it was an implied condition of the contract that the plaintiffs should continue to carry on their business.

Lord Alverstone C.J. held that it was an implied term of the contract that the plaintiffs would continue to carry on business during the full period of four years, and would not during that period do any act disabling themselves from earning profits or preventing the defendants from being their customers, and that the defendants were entitled to damages.

Asquith, K.C., Duke, K.C., Hemmerde, and *F. E. Smith,* for the plaintiffs. The contract contains no express agreement that the plaintiffs will continue to carry on their business for four years, and no such agreement on their part should be implied. There being no express agreement by either party to carry on business for four years, the true construction of the

C. A. 1904

OGDENS, LIMITED v. NELSON. THE SAME v. TELFORD.

contract is that neither party is bound to carry on his business for that time. The only implication that can properly be introduced is a proviso in some such form as "provided that you continue to carry on business during that period." The question is what the bargain means as between business people. The benefit to be derived by the defendants under the contract depended entirely upon their being customers of the plaintiffs, and as soon as that relation ceased the benefit ceased also, for the proportionate amount of the bonus to which they were entitled was measured by the amount of their purchases during each quarterly period. The case is similar to *Rhodes* v. *Forwood* (1), where it was held that the risk of a colliery owner selling his colliery was one of the risks which an agent with whom he had previously entered into a contract took upon himself; so in the present case the defendants took upon themselves the risk of the plaintiffs parting with their business to a purchaser.

[They also cited *The Moorcock*. (2)]

Bankes, *K.C.*, and *J. R. Randolph*, for the defendants. Under the contract the defendants became absolutely entitled to a share of the bonus promised by the plaintiffs for four years, provided that they were customers of the plaintiffs; the vital part of the consideration moving from the defendants was executed by them upon their signing the agreement, for they thereby debarred themselves from entering into a similar agreement with the trade rivals of the plaintiffs. Upon the true construction of the contract there is a positive undertaking by the plaintiffs to pay a share of the bonus to the defendants for four years, and the plaintiffs cannot, by ceasing to carry on their business during that period, disable themselves from carrying out their contract. If any implication is needed, it must be to the effect that the plaintiffs will not wilfully do any act which would put it out of their power to perform their contract, and there is a series of authorities by which the reading of such a term into the contract is justified. It cannot be an implied term of such a contract that it is only to last so long as the plaintiffs choose to carry on their busi-

(1) (1876) 1 App. Cas. 256. (2) (1889) 14 P. D. 64.

ness, and that it may at any time be terminated by their sole act.

[They cited *McIntyre* v. *Belcher* (1); *Stirling* v. *Maitland* (2); *Inchbald* v. *Western Neilgherry Coffee Co.* (3); *Telegraph Despatch and Intelligence Co.* v. *McLean* (4); *Turner* v. *Goldsmith* (5); *Hamlyn* v. *Wood* (6); *Brace* v. *Calder* (7); *Northey* v. *Trevillion.* (8)]

Duke, K.C., in reply.

COLLINS M.R. The question raised by this appeal is whether upon the true construction of the agreement between the parties the plaintiffs were, by reason of their having sold their business, emancipated from the obligation of paying certain sums of money to the defendants which would undoubtedly have been payable if they had continued to carry it on. The question arises thus. The plaintiffs had formed a scheme for capturing the tobacco trade in the United Kingdom, and were confronted by the powerful opposition of a counter-scheme launched by the Imperial Tobacco Company of Great Britain and Ireland. In the throes of this competition each competitor was making better and better offers to customers and intending customers, and the plaintiffs thought it worth while to make the arrangement with customers which we are now considering. They sent round a circular in which they invited the attention of customers to the terms offered by the Imperial Tobacco Company, pointing out the defects, moral and practical, of that scheme and the better terms which they were themselves offering. The material part of the offer contained in the circular is in these terms: "Commencing April 2, 1902, we will for the next four years distribute to such of our customers in the United Kingdom as purchase direct from us our entire net profits on the goods sold by us in the United Kingdom. In addition to the above we will, commencing April 2, 1902, for the next four years distribute to such of our customers in the United Kingdom as purchase direct from us

(1) (1863) 14 C. B. (N.S.) 654.
(2) (1864) 5 B. & S. 840.
(3) (1864) 17 C. B. (N.S.) 733.
(4) (1873) L. R. 8 Ch. 658.
(5) [1891] 1 Q. B. 544.
(6) [1891] 2 Q. B. 488.
(7) [1895] 2 Q. B. 253.
(8) (1902) 7 Com. Cas. 201.

C. A. 1904

OGDENS, LIMITED v. NELSON. THE SAME v. TELFORD.

Collins M.R.

the sum of two hundred thousand pounds per year." That circular points out the advantages of the plaintiffs' scheme, and it was accompanied by a draft letter addressed to the plaintiffs, which the customer was invited to sign and which would, when signed, complete the contract between the parties. The defendants signed the draft letter, which was as follows: "I beg to inform you that I have not signed the agreement with the Imperial Tobacco Company, Limited, dated March, 1902, and in consideration of participating in your bonus distribution of the entire net profits on goods sold by you in the United Kingdom and two hundred thousand pounds per year for the next four years as set out in your particulars, I hereby agree not to sign it or any similar agreement with the Imperial Tobacco Company, Limited, or any other company or firm containing any conditions which would prevent me from buying, displaying, selling, or distributing your goods or the goods of any other manufacturer, and I also undertake to continue to buy, display, and sell your goods." When this document was signed by the would-be customer, the plaintiffs procured at once a benefit which was most essential from their point of view—that is, an undertaking by the customer which at once severed him from their rivals, the Imperial Tobacco Company, and which further prevented his signing any agreement which would have the effect of preventing him from dealing with the plaintiffs; so that the plaintiffs at once secured his secession from the opposing undertaking and an undertaking not to join it or any similar undertaking in the future. Could the plaintiffs get this substantial advantage, and yet hold in their hands the power to destroy the benefit which the customer was to get in return for the consideration which he had given? The particulars of that which the plaintiffs were to give in return to their customers are absolute and express: they bound themselves for the next four years to distribute as a bonus among their customers two separate things—the entire net profits on goods sold by them in the United Kingdom, and also a sum of 200,000*l.* a year. On the face of it there is a contract whereby a present advantage is secured to the plaintiffs by reason of the secession of their customers from

the rival combination and their undertaking not to join it or a similar body for four years, and on the other side the plaintiffs give an absolute undertaking, to extend over four years, by which they bind themselves to distribute these sums among their customers. It was contended during the argument that, notwithstanding the fact that the consideration moving from the customer was to a great extent executed, and that the terms of the contract between the parties were distinct, the plaintiffs might, as soon as convenient to themselves, dispose of their business and then turn round and say that, although they had on their part got what they wanted, there were no profits and no bonus to distribute, because they had not undertaken to go on with the business, and, not having gone on with it, those who had been customers were no longer customers, and were therefore not entitled to participate in the profits or the bonus distribution.

Upon this state of facts one of the contentions on behalf of the plaintiffs was that, in order to establish their case, the defendants must rely upon an implication of law that the plaintiffs would continue to carry on their business for the four years and not upon the terms of the contract itself. No doubt they must face that difficulty; but, as I pointed out during the argument, such a contention would be just as strong if, while the plaintiffs were still carrying on business, an intending customer, who had signed the agreement, came to them and asked them to be supplied with tobacco, and they had refused to supply it: that would entirely defeat the position of the intending customer, for if he could not obtain tobacco from the plaintiffs he would not be their customer, and as their obligation extended to no one but customers, they could set up that they were absolved from their undertaking. The argument is as strong in the one case as in the other. If it is necessary to read into the agreement an implied term that the plaintiffs would not, so long as they carried on their business, refuse to supply tobacco to a would-be customer who had signed the agreement and so keep him out of the category of actual customers, it is equally necessary to read into it a term that the plaintiffs will not by their own deliberate act prevent him from

C. A. 1904

OGDENS, LIMITED v. NELSON. THE SAME v. TELFORD.

Collins M.R.

being a customer by ceasing to carry on their business during the period for which the agreement was intended to last.

Questions of this kind have frequently arisen, and there is a long line of authorities on the point, to many of which we have been referred during the argument. In my opinion there is a broad line of demarcation running through these decisions, and the large majority of them lie on one side of the line. The broad general principle to be extracted from them is that, where the consideration which one of the parties is to receive depends on the other party continuing in the same condition, there is an implied obligation on the part of the latter to keep in existence the conditions out of which his ability to make a return for the benefit received by him arises. A typical case is that of the sale of a business where part of the consideration for the sale is to be some part of the future profits of the business; there is clearly in such a case an implied contract by the purchaser to carry on the business, so that the profits may be made out of which the purchase-money is to be found; it is an illustration of the principle that one of the contracting parties cannot get his own profit and then refuse to make the agreed return to the other party. In the present case the consideration on the part of the customers has been in great part executed by their undertaking to withdraw from the rival company and not to enter into an agreement with them. The position is the same as that of a person who has sold his business and takes from the purchaser a contract that he will pay the consideration out of the profits of the business; in any such case there must be an implied obligation on the purchaser not to make the performance of the contract on his part impossible.

It was contended on the part of the plaintiffs that the case of *Rhodes* v. *Forwood* (1) was to a contrary effect and was decisive in their favour; but that was a very peculiar case depending on very special circumstances. In substance it amounted to this: a colliery owner appointed certain persons sole agents at Liverpool for the sale of his coals coming from a particular colliery, the contract being for seven years but determinable in certain events. There was no express term in

(1) 1 App. Cas. 256.

the contract obliging the colliery owner to send any part of his coal to Liverpool; he might sell it all elsewhere, and there was therefore no obligation on him to place coals for sale in the hands of his Liverpool agents. The colliery owner having sold his business within the seven years, it was held that the Liverpool agents were not entitled to compensation, because there was no contract to supply them with coal, but merely a contract to appoint them his agents. That case has been much criticized and has been distinguished on the ground that there was clearly no contract to find work for the agents in that capacity during the whole seven years; and in *Turner* v. *Goldsmith* (1) Lindley L.J. said: "It was contended that the point was settled by authority. I will refer to three cases on the subject. In *Rhodes* v. *Forwood* (2) it was held that an action very similar to the present was not maintainable. But that case went on the ground that, there not being any express contract to employ the agent, such a contract could not be implied. In the present case we find an express contract to employ him." For the reasons which I have given I think that the present case falls outside the narrow line laid down in *Rhodes* v. *Forwood* (2); on one side the consideration for the contract has been executed, and on the other side there is an absolute and unqualified contract to distribute among the customers for four years the net profits of the business and a bonus of 200,000*l*. Under the circumstances there is a necessary implication that the plaintiffs will not put it out of their power to carry out their undertaking to distribute these sums. I think, therefore, that the judgment of the Lord Chief Justice is right and that the appeal should be dismissed.

ROMER L.J. I am of the same opinion. After what my Lord has said as to the authorities, it is not necessary for me to discuss them. And, indeed, they are only useful as authorities in so far as we can extract from them the principles on which a Court should act in dealing with such a contract; the ultimate consideration in this case and in all such cases is what is the true construction of the contract itself. As to the

(1) [1891] 1 Q. B. 544. (2) 1 App. Cas. 256.

C. A. 1904

OGDENS, LIMITED v. NELSON. THE SAME v. TELFORD.

Romer L.J.

contract in the present case, it is to be noted that the defendants, upon signing it, at once parted with and gave valuable consideration for the promise by the plaintiffs, for, in the first place, they agreed that they would not sign the agreement with the Imperial Tobacco Company, that they would not sign a similar agreement with that company or with any other company containing conditions which might prevent their buying, displaying, selling, or distributing the plaintiffs' tobacco, and, lastly, that they would continue to buy, display, and sell the plaintiffs' goods. I need not consider the extent of the obligation imposed on the defendants by the last undertaking. On turning to the plaintiffs' contract, what obligations do we find that they undertake? In my opinion they entered into an absolute contract with the defendants to distribute during a period of four years among their customers in the United Kingdom, first, the entire net profits of the plaintiffs' business in the United Kingdom, and, secondly, the sum of 200,000*l.* in each of the four years. Then come provisions as to the distribution of these sums among the customers. These undertakings on the part of the plaintiffs are absolute in form, and in my opinion they are absolute in substance; they are obligations which the plaintiffs intended should bind them for four years. If the contract is fairly considered, it cannot be implied in favour of the plaintiffs that after entering into these obligations they should as against the defendants be at liberty of their own free will to stop selling their goods in the United Kingdom, or voluntarily to do an act which would make impossible the distribution of the sums which they had expressly contracted to distribute. This really determines the present case, for there has without doubt been a breach of contract on the part of the plaintiffs. The assignment of their business was a voluntary act on their part which prevented the defendants from obtaining the benefit of the sums which the plaintiffs had contracted to distribute among their customers, and was a clear breach of contract for which the defendants are entitled to substantial damages.

MATHEW L.J. I am of the same opinion. When once the interest of each contracting party has been ascertained, the

question resolves itself into a contest between two implications. The plaintiffs contend that the duration of the contract is a matter which is optional with them in this sense, that it is only to last as long as they choose to continue their business, and that it may be put an end to at any time when they may come to an agreement with their trade rivals and cease to carry on a separate independent business. The defendants, on the other hand, insist that the agreement is for four years certain, and it is in my opinion clear from the terms of the agreement itself that the latter contention is correct. It is unnecessary to go minutely through the terms of the circular of March 22; it provides, as it seems to me, that, if the defendants will continue to be customers of the plaintiffs, they shall have the benefit for four years of the payments which the plaintiffs promise to make. The plaintiffs cannot repudiate that undertaking, or so act as to prevent themselves from dealing with the defendants as their customers. On behalf of the plaintiffs reliance has been placed on the cases of *Rhodes* v. *Forwood* (1) and *Hamlyn* v. *Wood* (2); but when they are examined it is clear that the agreements there sought to be enforced were merely optional. No doubt there is some conflict of authority in the decisions which have been cited to us, but the inconsistency is more apparent than real, and is explained by the varying circumstances of the different cases. Upon the construction of the particular agreement in the present case I do not see that any authority is needed.

Appeal dismissed.

Solicitor for plaintiffs: *G. Thatcher, for Grace, Smith & Hood, Liverpool.*

Solicitors for defendants: *Bell, Brodrick & Gray, for Cousins, Botsford & Phœnix, Cardiff.*

(1) 1 App. Cas. 256. (2) [1891] 2 Q. B. 488.

W. J. B.

1904
April 29.

CORBETT *v.* PEARCE.

Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 8—"*Workman*"—*Hand assisting to navigate Barge on River*—"*Seaman*"—*Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 13—*Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 2.

The term "seaman" in s. 13 of the Employers and Workmen Act, 1875, means "seaman" as defined by s. 2 of the Merchant Shipping Act, 1854.

A vessel which is not propelled by oars is not the less a "ship" within the meaning of the Merchant Shipping Act, 1854, because she is navigated only on a tidal river.

The plaintiff was one of a crew of two hands employed on board a spritsail barge to navigate her in the estuary and upper tidal waters of the Thames. The plaintiff, acting under the orders of the other hand, assisted in navigating the barge, though his main duty was to assist in loading and unloading her:—

Held, that the plaintiff was a "seaman," and was consequently excluded from the operation of the Employers' Liability Act, 1880.

APPEAL from Brentwood County Court.

The action was brought to recover damages under the Employers' Liability Act, 1880, for an injury sustained by the plaintiff whilst working on board the defendant's spritsail barge *Alexandra*. The barge was of a burthen of 38½ tons, and was registered as a British ship. She was employed to navigate the estuary and tidal waters of the river Thames from Sea Reach to Vauxhall. On the voyage upon which the accident complained of occurred the plaintiff and the captain, a man named Naylor, were the only two hands on board. The plaintiff, acting under the orders of Naylor, assisted in navigating the barge, though his main duty was to assist in loading and unloading her. After taking a cargo down to Holehaven in Sea Reach, near the mouth of the river, the barge sailed back to Woolwich, where she was taken in tow with some other barges abreast of her, they being kept in their places by means of a breast-rope. On the journey it became advisable to alter the respective positions of the barges, and the plaintiff was ordered by Naylor to hold on to the breast-rope.

The rope, which was defective, broke, with the result that the plaintiff suffered the injury complained of. For the defence it was contended that the plaintiff was a seaman, and that he consequently could not sue under the Employers' Liability Act. The judge held that under the circumstances he was not a seaman, and gave judgment for the plaintiff. The defendant appealed.

R. Dunlop, for the defendant. No one can sue under the Employers' Liability Act who is not a workman, and by s. 8 of that Act "workman" is defined to mean any person to whom the Employers and Workmen Act, 1875, applies. By s. 13 of the latter Act that Act shall not apply "to seamen or to apprentices to the sea service." There is no definition in that Act of "seamen," nor is there any definition of the word in another Act passed on the same day, the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), which in s. 16 contains a similar provision, that "nothing in this Act shall apply to seamen or to apprentices to the sea service." The reason for excluding seamen and apprentices to the sea service from the operation of those Acts was that they were already the subject of special legislation in the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), and it is in that Act that the definition is to be found. The fact that both the Acts of 1875 distinguish apprentices to the sea service from seamen, whereas the term "seaman" in its popular sense would include apprentices, suggests that the Legislature had in their mind the Merchant Shipping Act. And in *Reg.* v. *Lynch* (1) it was expressly held that the term "seamen" in s. 16 of the Conspiracy and Protection of Property Act meant seamen as defined by the Merchant Shipping Act. The definition in s. 2 of that Act is as follows: "'Seaman' shall include every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship," and "'ship' shall include every description of vessel used in navigation not propelled by oars."

The plaintiff in the present case comes exactly within that

(1) [1898] 1 Q. B. 61.

1904

CORBETT v. PEARCE.

definition. The barge was not propelled by oars, and she was not the less used in navigation because she was only used in a river. No doubt a barge used on an artificial inland waterway like a canal cannot be said to be used in navigation, and a man employed upon her is not thereby a seaman: *Oakes* v. *Monkland Iron Co.* (1) But the term "ship" in the Merchant Shipping Act is not confined to seagoing ships.

Overend, for the plaintiff. The man was not a seaman. In the first place, this barge was not a ship, for she was not used in navigation, which means navigation on the seas. In *Salt Union* v. *Wood* (2), where one of the crew of a steam barge of 142 tons burthen, which was exclusively used upon certain rivers, refused to obey the orders of his employers, it was held that as the ship was not a seagoing ship he was not a seaman and could be made to pay damages under s. 4 of the Employers and Workmen Act, 1875. Secondly, even if the barge was a ship, the plaintiff was not employed on her in such a capacity as to make him a seaman. The words in the definition clause, "engaged in any capacity," must be read with certain limitations; otherwise, as pointed out by Lord Coleridge C.J. in *Reg.* v. *City of London Court* (3), it would include a stevedore. It must be confined to persons whose main duty is to attend to the navigation. Here it is found that the man's main duty was loading and unloading. In *Yarmouth* v. *France* (4) Lord Esher M.R., dealing with the question whether a man who drove a horse and trolley for a wharfinger was a workman within the Employers' Liability Act, said: "We must take into account what his ordinary duty was. He has to load and unload the trolley. That is manual labour. His duty may be compared to that of a lighterman who conducts a barge or lighter up and down the river. The driving the horse and trolley and the navigating of the lighter form the easiest part of the work; his real labour, that which tests his muscles and his sinews, is the loading and unloading of the trolley or the lighter."

(1) (1884) 21 Sc. L. R. 407.
(2) [1893] 1 Q. B. 370.
(3) (1890) 25 Q. B. D. 339, at p. 342.
(4) (1887) 19 Q. B. D. 647, at p. 651.

1904

CORBETT v. PEARCE.

LORD ALVERSTONE C.J. The question here raised, whether a person employed in the manner in which the plaintiff was employed in this case is a workman within the meaning of the Employers' Liability Act, 1880, is one of very general importance. That Act brought within its provisions all "workmen" as defined by the Employers and Workmen Act, 1875, which Act, after defining "workman" in s. 10, proceeded in s. 13 to provide that "This Act shall not apply to seamen or to apprentices to the sea service." Although that latter section is repealed by s. 11 of the Merchant Seamen Act, 1880, so far as it operates to exclude seamen and apprentices to the sea service from the Act of 1875, it is expressly provided by s. 11 that "such repeal shall not in the absence of any enactment to the contrary extend to or affect any provision contained in any other Act of Parliament passed, or to be passed, whereby workman is defined by reference to the persons to whom the Employers and Workmen Act, 1875, applies." So that the effect is that seamen are excluded from the operation of the Employers' Liability Act, 1880. And the question is whether the plaintiff here was a seaman. It must be borne in mind that in the same year as that in which the Employers and Workmen Act, 1875, was passed another Act was passed, the Conspiracy and Protection of Property Act, 1875, which also expressly excluded from its operation "seamen" and "apprentices to the sea service." And the reason for the exclusion of those persons from the operation of those Acts is to be found in the fact that there was then in force an elaborate code of legislation specially dealing with those persons, namely, the Merchant Shipping Act, 1854. The term "seamen" must be assumed to have been used in the same signification in all three Acts. And as neither of the Acts of 1875 contain a definition of that term, we must seek its definition in the Act of 1854. By s. 2 of that Act "seaman" was defined to "include every person employed or engaged in any capacity on board any ship." And "ship" was defined to "include every description of vessel used in navigation not propelled by oars." I do not say, and it is not necessary for our decision to consider, whether a person who

1904

CORBETT v. PEARCE.

Lord Alverstone C.J.

was only temporarily on board a ship in port for the purpose of doing work there would come within the expression "seaman" as so defined. I mention that in order that it may not be supposed that we are expressing any opinion that painters who go on board to paint the ship, or stevedores who go there to stow or trim cargo, are seamen within the meaning of the Act. But we are not dealing with that case; the plaintiff here was a man who was one of the crew of a vessel registered as a ship, which carries cargo from the estuary of the Thames to other parts of the river, and which might go, as I daresay similar vessels are constantly going, for a coasting voyage of a greater or less distance. The accident in the present case happened by reason of the defective condition of a rope which the plaintiff, acting under the orders of the master, was shifting in the course of the navigation of the vessel in the up-river part of the voyage. In my opinion the man is clearly for the purposes of this legislation a seaman. The vessel is navigated on tidal waters; it is not propelled by oars; and the man is engaged upon that vessel to do navigation work. We should be straining the language of the Act if we were to hold that he was not a seaman. With regard to the dictum of Lord Esher M.R. in *Yarmouth* v. *France* (1), that the real work of a lighterman is not so much the navigation of the lighter as the loading and unloading of her, it is enough to say that his attention was directed, not to the question whether a lighterman is a seaman or not, but to the question whether he is engaged in "manual labour." The case of *Oakes* v. *Monkland Iron Co.* (2), where it was held by the Scottish Court that a fireman on board a steam barge plying on a canal was not a seaman within the Act, turned upon the point that such work done on a vessel on artificial inland water could not be said to be navigation at all. For these reasons I am of opinion that the appeal must be allowed.

WILLS J. Whether the question is considered from the point of view that the word "seaman" in the Employers and Workmen Act ought to receive the same construction as it

(1) 19 Q. B. D. 647, at p. 651. (2) 21 Sc. L. R. 407.

was given by definition in the Merchant Shipping Act, or whether it is considered from the point of view that the word "seaman" is to be understood in its natural and ordinary signification, in my opinion this man was a seaman, and is consequently excluded from the benefits of the Employers' Liability Act. There certainly seems to me to be very good ground for holding that the word "seaman" should receive the same construction in the Act of 1875 that it did in the Merchant Shipping Act, 1854, for the Act of 1854, which was in force at the time that the Act of 1875 was passed, formed a complete code of law affecting all the relations into which seamen are brought in the course of their employment, and the remedies for accidents which persons of that class are liable to sustain on board ship. And it seems reasonable that when the Act of 1875 excludes seamen from its operation, but does not define the term "seaman," one should turn to that extensive code to ascertain who were the persons intended to be excluded. But supposing that were not so, what is usually understood by the term "seaman" in its ordinary acceptation? It seems to me that a correct definition was given in the case, to which we have been referred, of *Reg.* v. *City of London Court* (1), where it was held that a person whose ordinary duties led him to take part in the navigation of a seagoing ship was entitled to a remedy against the ship for his wages, although the services rendered by him consisted in superintending repairs to the ship while in port. It was there said: "The right to proceed in rem for services rendered on board a ship apparently extends to every class of person who is connected with the ship as a ship, as a seagoing instrument of navigation, or of transport of cargo from one place to another, and to services rendered by such persons in harbour just as much as to services rendered by them at sea." That description of the persons who may popularly be called seamen is very applicable to the present case. It seems to me, therefore, that whether we refer to the Merchant Shipping Act as the test of what a seaman is, or whether we deal with the matter apart from that Act, this man was a seaman. He was a deck hand: there were only two of them;

(1) 25 Q. B. D. 339.

1904

CORBETT v. PEARCE.

WILLS J.

he must have been employed in trimming sails and in doing all the work of navigation which could not be done by the other man at such times as the services of both were required. The vessel was employed in navigation on a tidal river, and was propelled by sails, and the duties which a man engaged in the navigation of such a craft must perform necessarily involve a certain knowledge of seafaring matters. I cannot help thinking that it would be a perversion of language to say that a man so engaged was not a seaman.

KENNEDY J. I agree. The contention for the plaintiff is that he was not a seaman. But why was he not a seaman? He was employed on a vessel navigating the estuary of the Thames. She is a vessel of over thirty tons; her propelling power is not oars, but sails. Such a vessel comes directly within the terms of the definition of "ship" in the Merchant Shipping Act, 1854, a "vessel used in navigation not propelled by oars." I grant that in order to come within that definition the vessel must be used in "navigation" in the fair and proper sense of the term. And therefore a steam launch plying on an artificial piece of water half a mile long has been properly held not to be a vessel used in navigation. But, on the other hand, it is clear that the word "navigation" was never intended in the Merchant Shipping Act to be confined to the navigation of the waters of the sea as distinguished from rivers; for, as was pointed out by Cotton L.J. in *The Mac* (1), s. 19 of that Act spoke of "ships not exceeding fifteen tons burden employed solely in navigation on the rivers or coasts," shewing that the word "ship" in that Act may include a vessel used only on a river. Then if this vessel was a ship, the plaintiff, having been employed on board her to render the services which he did, was a seaman.

Judgment for the appellant.

Solicitors for appellant: *Holman, Birdwood & Co.*
Solicitor for respondent: *R. H. Ward.*

(1) (1882) 7 P. D. 126.

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1904
May 13.

YEOMAN *v.* THE KING.

Ship—Charterparty—Demurrage—Computation of Time—Time allowed for Discharging—Average Rate of Discharge—Fraction of a Day.

By a charterparty, by which a ship was chartered for the carriage of a cargo from Cardiff to Bermuda, it was provided that "the cargo shall be discharged at the average rate of not less than two hundred and ten tons per working day, weather permitting, the time to commence in accordance with the custom of the port; Sundays and all holidays, and time lost through strikes or locks out of workmen, accidents, frosts, floods, rains, winds, rollers, or any cause whatever beyond the control of the consignee of the cargo, not to count as discharging time: demurrage to be paid at the rate of fourpence per net register ton per day, and pro ratâ, employed beyond the time allowed for discharging." The ship arrived at Bermuda with her cargo. The time allowed for discharging began to run at 6 A.M. on Monday, July 15, 1901, and the discharge of the cargo was not completed till 3 P.M. on Monday, July 29. It was admitted that, on the assumption that a fraction of a day was to be taken into consideration, the time allowed, at the rate of discharge mentioned in the charterparty, for discharging the cargo was a period of eleven working days and a portion of a twelfth day, ending at 9 A.M. on Saturday, July 27:—

Held, that, upon the true construction of the charterparty, the demurrage began to run at 9 A.M. on Saturday, July 27, and not at the end of that day.

APPEAL from the judgment of Bigham J. on a petition of right tried by him without a jury.

The suppliant, who was the part owner and managing owner of a steamship, sued, on behalf of himself and his co-owners, for demurrage as after mentioned upon a charterparty made between himself and the Director of Transports, for and on behalf of the Lords Commissioners of the Admiralty, thereinafter called the charterers, whereby the ship was chartered for the carriage of a cargo of patent fuel from Cardiff to Bermuda.

The charterparty contained the following clauses. "(6.) The cargo shall be discharged at the average rate of not less than two hundred and ten tons per working day, weather permitting, the time to commence in accordance with the custom of the

C. A. 1904

YEOMAN v. REX.

port; Sundays and all holidays, and time lost through strikes or locks out of workmen, accidents, frosts, floods, rains, winds, rollers, or any cause whatever beyond the control of the consignee of the cargo, not to count as discharging time. (7.) Demurrage to be paid at the rate of fourpence per net register ton per day, and pro ratâ, employed beyond the time allowed for discharging."

The ship arrived at Bermuda with her cargo, which amounted to 2367 tons. It was admitted that the time allowed for discharging began to run at 6 A.M. on Monday, July 15, 1901, and that, on the assumption that a fraction of a day was to be taken into consideration, the time allowed, at the rate of discharge mentioned in the charterparty, for discharging the cargo was a period of eleven working days and a portion of the twelfth day, ending at 9 A.M. of Saturday, July 27. (1) The discharge of the cargo was not completed till 3 P.M. on Monday, July 29, and a sum had been paid for demurrage; but the Crown contended that the charterers were entitled under the charterparty to the whole of the working day on Saturday, July 27, for the purpose of discharging cargo, and that the demurrage did not begin to run till the end of that day, and therefore refused to pay any demurrage for detention during that day. The suppliant contended that the shipowners were entitled to demurrage as from 9 A.M. on Saturday, July 27.

Bigham J. gave judgment for the suppliant.

R. B. D. Acland, K.C. (*Sir R. B. Finlay A.-G.* with him), for the Crown. On the true construction of the charterparty the charterers were entitled to twelve working days for the discharge of the cargo, and the demurrage, therefore, did not begin to run till the end of the twelfth day. In *Commercial Steamship Co.* v. *Boulton* (2) it was held that a fraction of a day occupied in completing the discharge of cargo counted as a whole day for the purpose of calculating demurrage, on

(1) Somewhat difficult questions were originally raised between the parties which were disposed of by these admissions.

(2) (1875) L. R. 10 Q. B. 346.

the ground that there could not be a division of a day without express stipulation to that effect, and consequently the charterers were liable for two days' demurrage. On the reasoning of that case, it is contended that, conversely, if there is nothing in the charterparty to shew a contrary intention, the charterers are entitled to the whole of the broken day, where, at the rate of discharge mentioned in the charterparty, there is a fraction of a day allowed to complete the discharge of the cargo. The provision that the cargo shall be discharged at the average rate of not less than 210 tons per working day means that, taking one day with another, the cargo shall be discharged at that rate per day, and does not involve that during any hours of any particular day the discharge shall be proceeding at that rate. The meaning of the charterparty is that the number of entire days allowed as lay-days is to be determined by the number of days required for discharging the cargo at the average rate of not less than 210 tons per day, and not that a day shall be divisible into fractions. If 210 tons had been discharged on each of the eleven days ending with Friday, July 26, there would have been 57 tons left over, which would give the charterers another day.

Scrutton, K.C., and *A. A. Roche*, for the suppliant, were not called upon to argue.

COLLINS M.R. I think there is really no difficulty about this case when once the point in dispute is ascertained. The charterparty provides that "the cargo shall be discharged at the average rate of not less than two hundred and ten tons per working day, weather permitting, the time to commence in accordance with the custom of the port; Sundays and all holidays, and time lost through strikes or locks out of workmen, accidents, frosts, floods, rains, winds, rollers, or any cause whatever beyond the control of the consignee of the cargo, not to count as discharging time." That gives the principle upon which the time allowed for discharging cargo is to be calculated; and it seems to me that the plain meaning of the charterparty is that, when you have ascertained the point from which the time for discharging began to run, which is

C. A. 1904

YEOMAN v. REX.

Collins M.R.

now admitted to have been 6 A.M. on Monday, July 15, you have to calculate what period from that point of time, at the average rate of discharge mentioned, would be required for the complete discharge of the cargo. It is not disputed that the period so required is eleven working days and a portion of a twelfth, namely, eleven days ending with Friday, July 26, and a portion of Saturday, July 27, ending at 9 A.M. on that day. The contention of the Crown is that, because the charterers were entitled to part of the Saturday according to the specified rate of discharge, they were therefore entitled to the whole day. It seems to me that the terms of clause 6 of the charterparty negative that contention. I think that clause clearly provides that the charterers shall be entitled to such a period as, having regard to the number of tons to be unloaded, works out, as I have said, to eleven days and a portion of the twelfth ending at 9 A.M., and no more. I can see no reason in point of good sense, or upon the construction of the charterparty, why they should be entitled to any longer period. That seems to be really the whole point in the case. Unless the Crown is right in contending that, because the charterers were entitled to part of the Saturday under clause 6, they were entitled to the whole day, the appeal must fail. In order to make that proposition good, I think the Crown must get it out of the construction of clause 6, and, upon the true construction of that clause, it appears to me to afford no ground for the contention of the Crown. For these reasons I think the appeal must be dismissed.

ROMER L.J. I am of the same opinion. This case might, I think, really be dealt with very simply by merely saying that there is no reason upon the terms of the charterparty why, in calculating the time allowed for discharging the cargo, fractions of a day should not be taken into consideration. But I go further, for I think that it is clear upon the terms of the contract that they ought to be taken into consideration. In the first place, the contention of the charterers that, because the time for discharging cargo at the rate mentioned in clause 6 works out to eleven days and a fraction of a twelfth,

therefore they are entitled to twelve days, appears to me to contravene the terms of the clause; for, if the charterers took twelve days for the discharge of the cargo, they could not, I think, be said to have discharged the cargo "at the average rate of not less than two hundred and ten tons per working day." I do not see why, because the average rate mentioned does not work out to an exact number of days, it should therefore follow that it does not apply to a portion of a day. Again, on looking at the terms of the clause, it is clear that for some of its purposes at any rate portions of a day must be taken into consideration. It was not disputed that this would be so for the purposes of the provision with regard to time lost through strikes or locks out of workmen, accidents, and other causes beyond the control of the consignee of the cargo. If for that purpose, why not for other purposes? Lastly, I think that clauses 6 and 7 are connected, and must be read together; and it is clear that for the purposes of clause 7 a portion of a day must be taken into consideration. The only way of arriving at an intelligible construction of the contract appears to me to be by reading the two clauses together and construing each by reference to the other. Therefore, not only can I see no reason for acceding to the Crown's contention, but I think there are strong reasons upon the construction of the charterparty for not doing so.

MATHEW L.J. I agree. When the question really in dispute has been ascertained, the case does not seem to me to admit of much argument either way. The effect of the contract is in my opinion plain. The object of the provision for demurrage is that the shipowners may have their ship within their own control and available for their own purposes, free from any obligations to the charterers, by a certain time. At 9 A.M. on Saturday, July 27, the lay-days, or hours—for in this charter, which relates to a steamship, it appears to me to have been contemplated that it might be necessary to calculate by hours—were in my opinion at an end, and the demurrage began to run. Some demurrage was admittedly payable, because the ship was not completely discharged till 3 P.M. on the following

C. A. 1904

YEOMAN v. REX.

Mathew L.J.

Monday. It was argued for the Crown that, although that was so, in calculating the amount of the demurrage, the period of nine hours on Saturday must be left out, because the shipowners were not entitled to take into consideration a fraction of a day. I can see no reason why that should be so, or why the shipowners should not be entitled to have their ship discharged within the time which would seem to be clearly specified in the charterparty. The Crown contends that, because a fraction of a day must be employed in discharging the ship, the charterers were therefore entitled to the whole day for that purpose; so that, through negligence or indifference, they might allow valuable hours of the day to pass by, because they did not choose to proceed with the discharge of the ship, and then complete her discharge in the last hours of the day. That contention appears to me most unreasonable, and quite contrary to the well-recognised obligations of a charterer towards a shipowner. It may be most important for the ship to be discharged as early as possible, for her future engagements and chances of employment may depend upon it. I can see no foundation whatever for the contention for the Crown, apart from the terms of the contract, and, when those terms are looked at, they appear to afford strong reasons against it.

Appeal dismissed.

Solicitors for suppliant: *Botterell & Roche.*
Solicitor for the Crown: *Treasury Solicitor.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1904
June 7.

DAVID *v.* REES AND OTHERS.

Practice—Set-off of Judgments—Costs—Judgments for Costs in independent Litigations—Judgments for Costs for and against Party in different Capacities—Order LXV., *r.* 14 ; *r.* 27, *sub-r.* 21.

The provisions of Order LXV., r. 14, and Order LXV., r. 27, sub-r. 21, with regard to set-off of costs between parties are confined to cases in which the judgments for costs sought to be set off against each other are in the same action or proceeding, and do not extend to cases in which the judgments for costs are in distinct and independent litigations.

Barker v. *Hemming*, (1880) 5 Q. B. D. 609, and *Hassell* v. *Stanley*, [1896] 1 Ch. 607, followed.

APPLICATION for an order allowing a set-off of costs as after mentioned.

The plaintiff, Morgan Richard David, advanced moneys amounting to 78*l.* 8*s.* 9*d.* for the purposes of a football club, called the Aberaman Football Club, upon the joint and several agreement in writing of certain members of the club, among whom were one Thomas Rees, its treasurer, and one Ernest Henry Rees, who subsequently became its secretary, that the money should be repaid to the plaintiff. The money not being repaid, the plaintiff brought an action for the same in the High Court against Thomas Rees, Ernest Henry Rees, and other persons who had signed the agreement for the repayment of the money. Thomas Rees and one of the other defendants, named Parry, allowed judgment to go against them in default of appearance. An application being made against the remaining defendants, among whom was Ernest Henry Rees, for leave to sign judgment against them under Order XIV., a judge at chambers gave them unconditional leave to defend, and ordered that the action as against them should be remitted to the county court. The action was subsequently tried in the county court, and judgment for the amount claimed, with costs amounting to 33*l.* 2*s.* 2*d.*, was given for the plaintiff against those defendants.

C. A. 1904

DAVID v. REES.

It appeared that a sum of 84*l.* 12*s.* 5*d.*, which was alleged by the plaintiff really to belong to the Aberaman Football Club, was standing in a bank in the names of the defendants, Thomas Rees and Ernest Henry Rees, and a solicitor named Thomas William Griffiths. The before-mentioned judgments remaining unsatisfied, the plaintiff instituted garnishee proceedings in the High Court, alleging that the Aberaman Football Club were indebted to the judgment debtor, Thomas Rees, to an amount equal to that standing in the bank as before mentioned, in respect of a sum of 48*l.* due from the club to Thomas Rees as treasurer, and also in respect of an indemnity to which it was contended the judgment debtor, Thomas Rees, was entitled from the club against the judgment debt due to the plaintiff in the action. A garnishee order nisi was made, intituled "Between Morgan Richard David, judgment creditor, and Thomas Rees, judgment debtor, and the Aberaman Football Club, Thomas Rees, Ernest Henry Rees, and Thomas William Griffiths, the persons in whose names the funds of the club stand, garnishees"; and, there being no denial on the part of the club as regards the debt of 48*l.*, the order was afterwards made absolute by the master, for payment by the garnishees of the sum of 48*l.* to the plaintiff; and on appeal this order was affirmed by the judge at chambers. The defendant, Ernest Henry Rees, appealed to the Court of Appeal, who ordered that the appeal should be allowed with costs both in the Court of Appeal and before the judge and master in chambers to be paid by the plaintiff, Morgan Richard David, to Ernest Henry Rees, and that the garnishee orders made by the master and judge should be discharged as against the said Thomas Rees, Ernest Henry Rees, and William Thomas Griffiths, and so far as they purported to attach funds in their hands. The costs so allowed to Ernest Henry Rees had been taxed and amounted to 34*l.* 4*s.*

The plaintiff, Morgan Richard David, applied that execution for these costs might be stayed, and for an order that they should be set off against the amount due from Ernest Henry Rees to the plaintiff upon the before-mentioned county court judgment.

W. Denman Benson, for the plaintiff. It is submitted that the Court has a discretion under Order LXV., r. 14, to order the costs due from the plaintiff to Ernest Henry Rees to be set off against the costs due from the latter to the plaintiff. Order LXV., r. 27, sub-r. 21, also provides for such a set-off. It was held in *Edwards* v. *Hope* (1) by a Divisional Court that Order LXV., r. 14, only applies to a set-off of damages or costs in the same action or proceeding; the Court of Appeal, however, did not affirm the decision on the same ground, but said that either the rule did not apply, or, assuming that it did apply, nevertheless, in the exercise of the discretion which was given them by the rule, they would not allow the set-off so as to destroy the solicitor's lien. In *Hassell* v. *Stanley* (2) Chitty J. held that the rule applies only to a set-off of costs in the same action or proceeding, and not to a set-off of costs in distinct and independent proceedings. That decision does not bind this Court, but, assuming that it is right, it is submitted that the costs which it is in this case sought to set off are, within the meaning of that decision, costs in the same and not in distinct and independent proceedings. No doubt the judgment against Ernest Henry Rees was given in the county court, but the action was originally commenced in the High Court against him and the other defendants, and the garnishee proceedings were taken in that action. The case of *Barker* v. *Hemming* (3) was not a decision as to the effect of Order LXV., r. 27, sub-r. 21, but as to that of the old rule in force prior to 1883.

Assuming that neither Order LXV., r. 14, nor Order LXV., r. 27, sub-r. 21, applies, it is clear that the old practice as to setting off cross-judgments, which existed before the Judicature Acts, still exists, and under that practice the Court has a discretion to order these costs to be set off. [He also cited *Blakey* v. *Latham*. (4)]

Harold Simmons, for the defendant, Ernest Henry Rees. *Barker* v. *Hemming* (3) is a decision of the Court of Appeal that a rule in terms similar to those of Order LXV., r. 27,

(1) (1885) 14 Q. B. D. 922.
(2) [1896] 1 Ch. 607.
(3) 5 Q. B. D. 609.
(4) (1889) 41 Ch. D. 518.

C. A. 1904

DAVID v. REES.

sub-r. 21, only applied to costs in the same action or proceeding, that being necessarily implied by the word "parties" used in the rule. The same reasoning applies to Order LXV., r. 14; and it is submitted that the decision of Chitty J. with regard to the effect of that rule in *Hassell* v. *Stanley* (1) was correct. The judgments for costs which it is here sought to set off against each other are not in the same proceedings or between the same parties. Where an action is remitted to the county court, it becomes an action in the county court, and the taxation of costs takes place there. So this case must be treated in the same way as if the action against Ernest Henry Rees had been commenced in the county court. But, even if that be not so, the garnishee proceedings cannot be considered as proceedings in the original action, and Griffiths, who was made a party to those proceedings, was not a member of the club or a party to the original action. In *Barker* v. *Hemming* (2) interpleader proceedings were held to be distinct from the original action. The old practice as to setting off judgments did not apply where the cross-judgments were not between the parties in the same rights. Here the action against Ernest Henry Rees in the county court was against him in his personal capacity. He was made a party to the garnishee proceedings merely in the capacity of a trustee of the club's funds.

W. Denman Benson, in reply.

COLLINS M.R. I think this application must fail. The facts are somewhat complicated, but, so far as material, they appear to be as follows. The applicant, Morgan Richard David, had recovered judgment in the High Court against one Thomas Rees, in respect of a sum advanced by the applicant for the purposes of a football club, called the Aberaman Football Club, for the repayment of which Thomas Rees had with others, of whom Ernest Henry Rees was one, agreed to become personally liable. The judgment debtor failed to satisfy the judgment so obtained against him, and there seems to have been no prospect of obtaining the fruits of that judgment by execution in the ordinary way. There appears, however, to have been a sum of

(1) [1896] 1 Ch. 607. (2) 5 Q. B. D. 609.

money in a bank, standing in the names of three persons, one of them being Ernest Henry Rees. The judgment creditor, David, alleged that this money really belonged to the club, and that the club was indebted to the judgment debtor, Thomas Rees, to that amount; and he contended, that being so, that the money so standing in the bank was applicable in satisfaction of the debt so due from the club to the judgment debtor, and, accordingly, took garnishee proceedings, in which he joined Ernest Henry Rees and the other two persons in whose names the money stood, as garnishees, for the purpose of attaching that money in their hands as being trustees of it on behalf of the club. The club not denying their indebtedness to the judgment debtor to the extent of 48*l.*, a garnishee order for payment of that amount to the judgment creditor was made absolute by the master, and affirmed by the judge, as against the club, and as against Ernest Henry Rees and the other two persons in whose names the money stood in the bank. Ernest Henry Rees appealed; and this Court allowed the appeal with costs, and discharged the garnishee order as regards Ernest Henry Rees and the two other persons in whose names the money stood, on the ground that there was no personal liability on their part to Thomas Rees, the judgment debtor. The present application is that the costs which on that appeal the judgment creditor, David, was ordered to pay to Ernest Henry Rees may be set off against an amount due from the latter to David for costs upon a judgment obtained by him in the county court against Ernest Henry Rees upon the before-mentioned agreement, to which, as I have said, he, as well as Thomas Rees, was a party.

It does not appear to me that by the rules made in pursuance of the Judicature Acts on the subject we are empowered to order that there should be such a set-off as is applied for in this case. The first rule which was relied upon, as providing for such a set-off, was Order LXV., r. 14, which provides that "a set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought." The other rule relied on as material was Order LXV., r. 27, sub-r. 21,

C. A. 1904

DAVID v. REES.

Collins M.R.

which provides that "in any case in which, under the last preceding regulation, or any other rule of Court, or by the order or direction of a Court or judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set-off, or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or such officer may allow or certify the costs to be paid, and direct payment thereof, and the same may be recovered by the party entitled thereto in the same manner as costs ordered to be paid may be recovered." Both these rules have been the subject of decision. In *Edwards* v. *Hope* (1) the effect of Order LXV., r. 14, was discussed. In that case the Divisional Court (Lopes and Cave JJ.) had expressed an opinion that Order LXV., r. 14, only applied to a set-off of damages or costs in the particular action. The head-note of the case in the Court of Appeal states that "the Court, upon an application to set off cross-judgments in distinct actions, are entitled, notwithstanding Order LXV., r. 14, to order that the set-off shall be subject to the lien for costs of the solicitor of the opposite party, for, assuming that rule 14 applies to a set-off in distinct actions, it leaves the Court a discretion to allow the set-off, either subject to or notwithstanding the solicitor's lien, and, if it has no application, the Court have the same discretion by the practice previous to Reg. Hil. Term, 1853, r. 63, which, since the repeal of that rule by the new rules, is revived." In that case Bowen L.J. said: "The Courts before the present rules had an equitable jurisdiction to set off against each other cross-judgments in the same action or in different actions, and in the same or in different Courts. The old practice is explained in Chitty's Practice, 8th ed. p. 625; and it appears that, in consequence of a diversity in the practice of the Court of Queen's Bench and that of the other Courts, rule 93 of 2 Will. 4 was passed, which is in the same terms as rule 63 of the Rules of Hilary Term, 1853, and which protected the solicitor's lien where the set-off was asserted in different

(1) 14 Q. B. D. 922.

actions. This rule is swept away by the new rules, and rule 14 of Order LXV. says that a set-off for damages or costs 'may' be allowed between parties notwithstanding the lien of the solicitor in the particular cause or matter in which the set-off is sought. It has been argued that this rule does not apply to cross-judgments in separate actions; but, in whichever way we construe the rule, it seems to me that the Court in allowing the set-off is at liberty to impose such terms as it thinks reasonable and just. If we interpret the rule as applying only to a set-off in the same action, it has no application to the present case, and, rule 63 of Hilary Term, 1853, having been abrogated, the old equitable jurisdiction of the Court is revived. If, on the other hand, rule 14 is taken to apply to a set-off in different actions, the Court, by the express terms of the rule, has a discretion as to the terms on which the set-off is to be allowed." In a subsequent case of *Hassell* v. *Stanley* (1) Chitty J. dealt with the same question. It was held in that case that costs incurred in the High Court could not be set off against costs obtained in the county court, although the proceedings were between the same parties; and that Order LXV., r. 14, does not apply to costs in independent proceedings. In that case Chitty J. said: "As the question I have just refrained from deciding"—i.e., the question whether Order LXV., r. 14, applies to a set-off of costs in distinct and independent actions and proceedings—"is now directly raised again, I am not going to avoid giving my decision on the point by sheltering myself under my judicial discretion; and I therefore say that, in my opinion, the principle adopted by the Divisional Court in *Edwards* v. *Hope* (2) and by Kay J. in *Blakey* v. *Latham* (3) applies to this case, and I therefore decline to make any order for a set-off of the costs of this motion against the costs obtained by the defendants in the county court." The case of *Barker* v. *Hemming* (4) was decided in the Court of Appeal with regard to the effect of Order VI., r. 19, of the rules prior to 1883, which was in terms substantially corresponding to those of Order LXV., r. 27, sub-r. 21. It was there held that

(1) [1896] 1 Ch. 607.
(2) 14 Q. B. D. 922.
(3) 41 Ch. D. 518.
(4) 5 Q. B. D. 609.

C. A.
1904
DAVID
v.
REES.
Collins M.R.

the set-off or deduction contemplated by that rule was limited to costs due to either party in respect of the same action, and could not be enforced in respect of the costs of any separate proceeding between the same parties. The plaintiffs having recovered judgment against two defendants, the judgment was set aside as against one defendant with costs. The same defendant having claimed goods taken in execution by the plaintiffs under the same judgment, the sheriff interpleaded, and an order was made barring the claim with costs to be paid to the plaintiffs. It was held that the master in taxing the costs of that defendant could not order the costs payable by him under the interpleader proceedings to be set off against the costs due to him in the original action from the plaintiffs. James L.J. said in giving judgment: "The plain meaning of Order VI., r. 19, is that costs are to be set off as between parties —not as between persons, but as between parties—in the same action, and in their character of parties to it. It cannot be supposed that the rule would apply to costs incurred by them in a distinct action in a different branch of the Court, and it can just as little apply to the costs incurred in this interpleader, which is a proceeding distinct from the action. It is true that the proceedings are intituled in the action, but that is merely a convenient mode of identifying them; it would be more correct to intitule them in the matter of the execution. They are distinct from the action, and it is a mere accident that Hemming, a party to these proceedings, is also a party to the original action. I am of opinion that the rule has no application to the case, and that the appeal must be dismissed." The ground of that decision appears to be that, the set-off contemplated by the rule being as between the "parties" to an action or proceeding, it did not apply to a set-off of the costs in distinct and independent proceedings between the same persons. On looking to the terms of Order LXV., r. 14, and Order LXV., r. 27, sub-r. 21, we find that it is a common feature of both rules that they are addressed to the matter of set-off between "parties." The case of *Barker* v. *Hemming* (1) is concerned with the rule which corresponds to Order LXV., r. 27.

(1) 5 Q. B. D. 609.

sub-r. 21, but the other rule is also open to similar observations to those made with regard to that rule. It appears to me that, having regard to the proceedings in respect of which the set-off of costs is now applied for, the present case is not within either of the rules, for the same reason as was applicable in the cases to which I have referred.

It was said in the cases of *Barker* v. *Hemming* (1) and *Edwards* v. *Hope* (2) that the old practice of allowing a set-off of judgments, although they were in different actions, and in certain cases although the parties were not identical, continued to exist. But that practice seems to have been limited to cases in which the set-off asked for was of cross-judgments between parties in the same right. It is stated in Lush's Practice, 3rd ed. p. 328, in reference to the old practice, that "a set-off will not be allowed even between the same parties, where the judgments are in different rights; as where one of the parties is trustee only in one, and in the other is interested in his own right"; and the case of *Bristowe* v. *Needham* (3) is cited as an authority for that proposition. In this case the set-off which we are asked to allow is a set-off of a judgment for costs obtained by a person sued in the capacity of a trustee against a judgment for costs obtained against the same person sued in his personal capacity. Such a set-off does not appear to fall within the old practice, and, as I have already pointed out, it does not come within the rules under the Judicature Acts specially providing for the set-off of costs to which I have before referred. For these reasons I think the application must be dismissed.

STIRLING L.J. I agree that the application must be dismissed, and substantially upon the same grounds; but I will state my reasons briefly in my own way. The applicant had advanced money for the purposes of a football club, called the Aberaman Football Club, which was an unincorporated body consisting of numerous members. The money so advanced not being repaid, the applicant sued certain members

(1) 5 Q. B. D. 609. (2) 14 Q. B. D. 922.
(3) (1844) 8 Sc. N. R. 366.

C. A. 1904

DAVID v. REES.

Stirling L.J.

of the club upon an agreement by which they had guaranteed its repayment. Against two of the defendants, of whom Thomas Rees was one, the plaintiff obtained judgment by default. The others, amongst whom was Ernest Henry Rees, defended the action. The action which had been commenced in the High Court was, as against those defendants, remitted to the county court, and the plaintiff obtained judgment for the amount claimed and costs against them in that court. The plaintiff, having failed to realize anything on the judgments so obtained by him, alleged that a debt was due from the club to Thomas Rees, the judgment debtor, and took garnishee proceedings for the purpose of attaching that debt as against the club, and the trustees of the club funds, one of whom happened to be Ernest Henry Rees. These proceedings succeeded in the Court of first instance against all the garnishees, but there was an appeal by Ernest Henry Rees to this Court, which held that the garnishee proceedings as against him and the other trustees were wrongly conceived, and that they ought not to have been made parties to those proceedings. The appeal was therefore allowed, and the judgment creditor was ordered to pay costs to the appellant Ernest Henry Rees. The application now made is that there may be a set-off of the costs so ordered to be paid against the costs for which the plaintiff obtained judgment against Ernest Henry Rees in the county court, and the question is whether we can grant that application. The application was based in the first instance upon Order LXV., r. 14, but it was pointed out that another rule might possibly apply, namely, Order LXV., r. 27, sub-r. 21; and it was further suggested that the application might be granted under the old equitable practice with regard to set-off of judgments, which remains still available in certain cases. I will deal first with Order LXV., r. 27, sub-r. 21. It was argued for the respondent that this rule was not applicable on the following grounds, namely, that there was an express decision of the Court of Appeal in *Barker* v. *Hemming* (1) on an old rule substantially identical in its terms with Order LXV., r. 27, sub-r. 21, to the effect that the rule

(1) 5 Q. B. B. 609.

only applied as between "parties," by which was meant, not the same persons merely, but parties to the particular litigation in their character of parties to it: and that the costs which it was in the present case sought to set off against the costs which the judgment creditor was ordered to pay were costs of an action in the county court, for such the action against Ernest Henry Rees became upon its being remitted to that court, whereas the costs ordered to be paid to Ernest Henry Rees were the costs of garnishee proceedings improperly instituted against him in the High Court. It appears to me that, upon the authority of *Barker* v. *Hemming* (1), Order LXV., r. 27, sub-r. 21, is not applicable to such a case as this. I come, therefore, to Order LXV., r. 14. It will be observed that, in the case of that rule again, the set-off contemplated is a set-off of damages or costs as between "parties." It appears to me that the reasoning upon which the judgment in the case of *Barker* v. *Hemming* (1) was based applies to that rule also. There is no decision in this Court exactly in point as to that rule, but the Divisional Court in *Edwards* v. *Hope* (2) expressly held that Order LXV., r. 14, only applied to cross-judgments for costs in the particular litigation, and did not extend to such judgments in distinct and independent proceedings. That view was also taken by Kay J. in *Blakey* v. *Latham* (3), and by Chitty J. in *Hassell* v. *Stanley*. (4) It appears to me, therefore, that both upon the ground which I have mentioned, namely, that the reasoning of *Barker* v. *Hemming* (1) applies, and also on the weight of authority, Order LXV., r. 14, does not apply to such a case as the present. There remains only the contention that the set-off may be allowed under the old equitable jurisdiction, which appears, as was pointed out in *Edwards* v. *Hope* (2), to be still in existence. But that jurisdiction seems never to have been applied where the cross-judgments were not as between the parties in the same capacity. Here the proceedings against Ernest Henry Rees in the county court were against him in his personal capacity, whereas the garnishee proceedings were against him merely in

(1) 5 Q. B. D. 609.
(2) 14 Q. B. D. 922.
(3) 41 Ch. D. 518.
(4) [1896] 1 Ch. 607.

C. A. 1904

DAVID v. REES.

the capacity of a trustee for the club. There was no debt due from him to Thomas Rees, the judgment debtor. Therefore it appears to me that on all the grounds relied on the application fails.

Application dismissed.

Solicitors for plaintiff: *E. F. Turner & Sons, for D. Richards, Aberdare.*

Solicitors for defendant Ernest Henry Rees: *Milner & Bickford.*

E. L.

C. A. 1904 *June* 15.

[IN THE COURT OF APPEAL.]

SELLAR *v.* CHARLES BRIGHT & CO., LIMITED.

Practice—Charging Order—"Stock or Shares" of a Company—Debentures—Order XLVI., *r.* 1—*Judgments Act*, 1838 (1 & 2 *Vict. c.* 110), *s.* 14.

Debentures of a company are not "stock or shares" of or in a company within the meaning of Order XLVI., r. 1, or the Judgments Act, 1838, s. 14, and therefore they cannot be made the subject of a charging order under the provisions of that rule and section.

APPEAL against an order made by Phillimore J. at chambers as after mentioned.

The plaintiff had recovered a judgment against the defendants in the High Court, and, that judgment remaining unsatisfied, a charging order nisi was obtained, and afterwards made absolute by Phillimore J. at chambers, under Order XLVI., r. 1, by which (inter alia) certain debentures of the Buenos Ayres Electric Tramways Company, Limited, standing in the name of a trustee for the defendants, were charged with payment of the amount due on the judgment.

C. A. Bennett, for the defendants. Under Order XLVI., r. 1, an order charging "stock or shares" may be made by any Divisional Court or by any judge, and the proceedings for obtaining such order shall be such as are directed, and the effect shall be such as provided, by 1 & 2 Vict. c. 110, ss. 14

and 15, and 3 & 4 Vict. c. 82, s. 1. The Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 14, speaks of "any stock or shares of or in any public company in England." Debentures are neither "stock" nor "shares." A distinction is drawn between "debenture stock" and "shares or stock" of a company by the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 23. The meaning of "stock" in the section is indicated by its collocation with "shares" as being something ejusdem generis therewith. If debenture stock would not be within the section, a fortiori debentures are not: see Palmer's Company Precedents, 8th ed. Part III. p. 5. Debentures are clearly not shares. They are simply specialty debts due from the company, which may or may not be secured by a charge on the company's assets. A debenture-holder as such is not a member, but a creditor of the company. He has no share in the capital of the company, and his right to payment is not dependent on its profits. He has not, as a shareholder has, a voice in the management of the company's affairs. In the case of *In re Bodman* (1) it was held by Chitty J. that a bequest of all the testator's shares in a gas company would not pass debenture stock of that company. He said in giving judgment: "Debenture stock therefore stands in a materially different position from that occupied by proprietary or capital stock of the company: in other words, debenture stock is borrowed money capitalized for purposes of convenience. The words used by this testator aptly and correctly describe his shares in this gas company, and I should be improperly extending the meaning of the word 'shares,' if I were to hold that it included debenture stock, which, as I have already explained, is property of a different kind altogether from the ordinary or proprietary stock of a company."

Alan Macpherson, for the plaintiff. It is submitted that the words of the rule and section, construed with reference to their object, may fairly be read as wide enough to cover debentures of a company. The object of the Legislature was to enable a judgment creditor to obtain security over property which could not be reached by the ordinary process of execution. The words "stock or shares" in that connection may

(1) [1891] 3 Ch. 135.

C. A. 1904

SELLAR v. CHARLES BRIGHT & Co., LIMITED.

fairly be read as including any share or part of the capital of the company in a business sense, though it might not be stock or shares in the technical sense for other purposes.

COLLINS M.R. It seems to me quite clear that, for the reasons stated in the argument of the defendants' counsel, the order made by the learned judge was wrong in so far as it purported to affect debentures, and to that extent must be discharged.

STIRLING L.J. and MATHEW L.J. concurred.

Appeal allowed.

Solicitor for plaintiff: *W. J. Hunter.*
Solicitors for defendants: *Bennett & Ferris.*

E. L.

1904
June 21.

SMITH *v.* GIDDY.

Nuisance—Overhanging Trees—Damage—Injunction.

An action lies against an adjoining landowner for allowing his trees to overhang the boundary to the damage of the plaintiff's crops.

APPEAL from the Chertsey County Court.

The plaintiff and the defendant were occupiers of adjoining premises at Feltham. The plaintiff alleged that he had sustained damage to the extent of 60*l.* by reason of certain elm and ash trees growing on the defendant's premises overhanging the plaintiff's premises and interfering with the growth of his fruit trees. The plaintiff claimed damages and an injunction.

The county court judge held that the plaintiff's only remedy was to abate the nuisance by cutting back the overhanging trees himself, and he directed a nonsuit. The plaintiff appealed.

A. T. Lawrence, K.C., and *Owen Thompson*, for the plaintiff. This action is maintainable. No doubt the only case to be found in the books in which an action has been supported for

damage caused by overhanging trees is one in which the damage was of a different kind. That was the case of *Crowhurst* v. *Amersham Burial Board* (1), where the defendants had planted on their land a yew tree which projected over their boundary and overhung the plaintiff's meadow, whereby a horse of the plaintiff fed on the projecting portion of the yew tree and was poisoned. It was held that the defendants were liable upon the principle of the maxim, "Sic utere tuo ut alienum non lædas." No distinction in principle can be drawn between that case and the present. The remedy of abatement is not sufficient. As Kelly C.B. pointed out in that case, "Although the right so to trim may be conceded, this does not dispose of the case, as the watching to see when trimming would be necessary, and the operation of trimming, are burdens which ought not to be cast upon a neighbour by the acts of an adjoining owner." And in *Lemmon* v. *Webb* (2) Kay L.J. in the Court of Appeal, after stating that the allowing of trees (in that case oaks and elms) to overhang the boundary is a nuisance, added: "For any damage occasioned by this an action on the case would lie." That dictum was no doubt only obiter, the question then before the Court being whether the owner of the land overhung could lop the trees without first giving notice to the owner of the trees, but the judgment in which the dictum occurs was a considered one.

R. J. Drake, for the defendant. There is no precedent for such an action in respect of the overhanging of non-poisonous trees. It may well be that the remedies in respect of trees which are poisonous are wider than those in respect of trees which are not, in proportion as the injury likely to be caused by them is greater. And this distinction was evidently present to the mind of Kelly C.B. in *Crowhurst* v. *Amersham Burial Board* (1), where he held that the overhanging of a yew tree was ground of action. He there said: "It may also be said that if the trees were innocuous, it might well be held, from grounds of general convenience, that the occupier of the land projected over would have no right of action, but should be left to protect himself by clipping. Such projections are

(1) (1878) 4 Ex. D. 5. (2) [1894] 3 Ch. 1.

1904

SMITH v. GIDDY.

innumerable throughout the country, and no such action has ever been maintained." By that term "innocuous" he clearly meant "non-poisonous"; he could not have meant "not causing damage of any kind," for in that case there would be no right to clip at all; if there is no damage at all, there is no nuisance; and if there is no nuisance, there is nothing to abate. That dictum of Kelly C.B. is an authority in the defendant's favour.

WILLS J. I am of opinion that the judgment of the county court judge in this case was erroneous, and that there must be a new trial. It is no doubt quite true that there is no case to be found in the books in which the action has been held to lie against an adjoining owner for allowing his trees to project over the boundary where the only damage resulting from the projection has been a damage to the plaintiff's crops. It was pointed out by Kelly C.B. in *Crowhurst* v. *Amersham Burial Board* (1) that there was no precedent for such an action, and it was there suggested that there was much to be said on grounds of general convenience in favour of such an action not being maintainable. But I am of opinion that the principle upon which that case was decided is enough to enable us to decide the present case in favour of the plaintiff. There the action was brought against the owners of a yew tree which they or their predecessors in title had planted on their land and which they allowed to overhang their boundary, whereby the plaintiff's horse in the adjoining meadow feeding on the projecting branches was poisoned; and it was held that the action lay. The Court treated the case as an illustration of the rule in *Rylands* v. *Fletcher* (2) that a person who brings on to his land something that is likely to do damage if it escapes is responsible if that damage occurs. It seems to me that there is no distinction in principle between the damage occasioned in that case and the damage in the present. The injury to the plaintiff's fruit trees was the natural consequence of the defendant's trees being allowed to overhang. I have come to this conclusion with considerable reluctance, for I have

(1) 4 Ex. D. 5. (2) (1868) L. R. 3 H. L. 330.

a strong feeling that it is highly desirable not to establish new causes of action if it can possibly be avoided, but I do not see how we can refuse to hold that this action lies without departing from the principle of *Crowhurst's Case*. (1) Moreover, we are fortified in this view by the dictum of Kay L.J. in the case of *Lemmon* v. *Webb* (2), where, although it was not necessary to the decision, he distinctly states it as his opinion that for any damage occasioned by overhanging boughs an action on the case would lie. It has been contended that the remedy which the plaintiff has of cutting the trees back himself is all-sufficient, and that under those circumstances it is unnecessary to invent a new cause of action. But that, in my opinion, is no answer to the action.

KENNEDY J. I am of the same opinion. The county court judge has nonsuited the plaintiff; therefore we must assume, for the purposes of the present argument, that the damage alleged in the particulars has actually been suffered. If that be so, the damage was substantial. And under those circumstances I fail to see any reason in principle why the action should not lie as for a nuisance. I cannot differentiate the present case in principle from *Crowhurst* v. *Amersham Burial Board*. (1) If trees although projecting over the boundary are not in fact doing any damage, it may be that the plaintiff's only right is to cut back the overhanging portions; but where they are actually doing damage, I think there must be a right of action. In such a case I do not think that the owner of the offending trees can compel the plaintiff to seek his remedy in cutting them. He has no right to put the plaintiff to the trouble and expense which that remedy might involve. The case must go back for a new trial.

Judgment for the appellant.

Solicitors for plaintiff: *Neave & Bretherton, for Cholmely & Taylor, Feltham.*

Solicitors for defendant: *Allen & Son.*

(1) 4 Ex. D. 5. (2) [1894] 3 Ch. 1.

J. F. C.

C. A.
1904
May 20.

[IN THE COURT OF APPEAL.]

SKINNER *v.* HUNT.

Metropolis—Management Acts—Paving Expenses—Payment by Occupier—Right of Deduction from Rent—Landlord and Tenant—Distress for Rent—Covenant by Tenant to pay Charges imposed by Local Authority—Metropolis Local Management Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 96.

Sect. 96 of the Metropolis Local Management Act, 1862, empowers a local authority to require the payment of any expenses, which the owner of any premises may be liable to pay, from the owner or occupier of the premises, and provides that the owner shall allow the occupier to deduct what he so pays "out of the rent from time to time becoming due in respect of the said premises, as if the same had been paid to such owner as part of such rent." And there is a proviso that nothing in the section contained shall be taken to affect any contract whatsoever between landlord and tenant:—

Held, that a payment made by a tenant to a local authority under this section is not a payment of or on account of rent, but a payment of or on account of expenses:—

Held, therefore, that when a tenant has covenanted with his landlord that he will bear the expenses which he has under s. 96 paid to the local authority, he has, by reason of the proviso, no right to deduct from the rent the amount which he has so paid, and the landlord's right to distrain for unpaid rent is unaffected.

Decision of Ridley J. reversed.

APPEAL from a judgment of Ridley J.

The action was brought to recover damages for an alleged illegal distress.

The defendant was tenant of a shop and premises, No. 1 Replingham Road, Wandsworth, under a lease dated November 5, 1896, granted to him by Jacob Budd for the term of twenty-one years from September 29, 1896, at a yearly rent of 40*l.* for the first seven years of the tenancy, payable quarterly on the usual quarter-days "clear of all deductions (except landlord's property tax)."

The lease contained a covenant by the lessee "that he will from time to time during the said term of twenty-one years pay the yearly rents hereinbefore reserved on the days and in manner aforesaid, and also will pay all tithe or rent-charge in lieu of

tithe, all sewers and main drainage rates, education rates, and all taxes, rates, and assessments whatsoever now or hereafter during the said term to be charged upon the premises or upon the landlord or tenant in respect thereof (the property or income tax on the said rent alone excepted)."

There was a further covenant "that the lessee shall and will observe and perform the stipulations under which the lessor holds the land hereinbefore expressed to be hereby demised (a copy of which stipulations is contained in the schedule hereto), and will indemnify the lessor from and against any breach thereof." And it was declared "that the rights and obligations of the lessor and lessee respectively under these presents shall be incident to and devolve with the reversion expectant on this lease and the leasehold interest hereby created respectively, and shall accordingly be enjoyed and observed and performed by the person or persons in whom such reversion and leasehold interest respectively shall for the time being be vested."

Among the stipulations contained in the schedule was the following: "The purchaser of each lot shall pay all charges imposed by any local authority on the frontagers in respect of such road and footpath" (i.e., the road and footpath abutting on the lot) "or the making or repair thereof."

The defendant Hunt was the mortgagee of the reversion; the other defendants were, a receiver of the rents of the premises appointed by Hunt under his statutory power as mortgagee, and the bailiff who had levied the distress of which complaint was made.

The receiver was appointed in February, 1900, and the plaintiff had paid the rent to him up to Michaelmas, 1902.

On December 18, 1902, a notice in writing was served on the plaintiff, signed by the clerk of the Wandsworth Borough Council (in pursuance of s. 96 of the Metropolis Local Management Act, 1862), as follows: "I beg to give you notice not to pay any rent now due or hereafter to become due in respect of the premises in your occupation, 1, Replingham Road, Wandsworth, without first deducting therefrom the sum of 34*l.* 19*s.* 2*d.* due to this council in respect thereof under the apportionment

C. A. 1904

SKINNER v. HUNT.

of the estimated cost of paving the road and footpaths there, and I hereby demand of you the amount of your rent as it becomes due, or so much thereof as shall be necessary to satisfy the above-mentioned claim of the council in the matter."

In consequence of this demand the plaintiff on January 20, 1903, paid to the council the sum of 10*l.*, the amount of the quarter's rent which became due from him at Christmas, 1902.

The defendants were informed of this payment, but they notwithstanding on February 12, 1903, distrained on the premises for the rent which became due at Christmas, 1902.

The action was brought on February 25, 1903, to recover damages for this distress, which the plaintiff alleged to be illegal.

In consequence of the plaintiff's threat to take legal proceedings, the distress was withdrawn on February 18.

The defendants counter-claimed for the Christmas rent, and also for the rent which had subsequently become due on March 25, 1903.

The validity of the distress depended on the construction of s. 96 (1) of the Metropolis Local Management Act, 1862.

(1) Sect. 96 repeals ss. 217, 218, and 219 of the Metropolis Local Management Act, 1855, and provides that in lieu thereof—"It shall be lawful for any vestry or district board, at their discretion, to require the payment of any costs or expenses, which the owner of any premises may be liable to pay under the said recited Act or this Act either from the owner, or from any person who then or at any time thereafter occupies such premises, and such owner or occupier shall be liable to pay the same, and the same shall be recovered in manner authorized by the recited Act and this Act; and the owner shall allow such occupier to deduct the sums of money which he so pays out of the rent from time to time becoming due in respect of the said premises, as if the same had been actually paid to such owner as part of such rent; provided always that no such occupier shall be required to pay any further sum than the amount of rent for the time being due from him, or which, after such demand of such costs or expenses from such occupier, and after notice not to pay his landlord any rent without first deducting the amount of such costs or expenses, becomes payable by such occupier, unless he refuse, on application being made to him for that purpose by or on behalf of the vestry or district board, truly to disclose the amount of his rent, and the name and address of the person to whom such rent is payable, but the burden of proof that the sum demanded from any such occupier is greater than the rent due by him at the time of such notice, or which has since accrued, shall lie upon such occupier; provided

At the trial of the action the jury assessed the damages at 50*l.*

The question of law upon the construction of s. 96 was then argued before Ridley J., and the learned judge, on January 21, 1904, held that the distress was illegal, and directed that judgment should be entered for the plaintiff for 50*l.* damages, and also that judgment should be entered for him on the counter-claim.

Upon the construction of s. 96 the learned judge held that the payment to the council was made as a payment of rent, and that, the rent being paid, the right to distrain was gone, though the tenant remained liable upon his covenant to pay the expenses.

In the course of his judgment Ridley J. referred to *Sweet* v. *Seager* (1), and said that, having regard to the dates in that case, he did not think the point which arose in the present case arose there. It was not dealt with by the counsel on either side or mentioned in the judgment of the Court. In *Sweet* v. *Seager* (1) the facts were thus stated in the report (2): "On December 16, 1856, the plaintiff was required by the said Board (of Works) to pay and did pay" (how he paid was not stated) "to the said Board the sum of 27*l.* 16*s.* 8*d.*, being the amount of the expenses paid by the said Board for the said works. On December 25, 1856, the sum of 22*l.* 10*s.* became due from the plaintiff to the defendant for a quarter's rent for the said house and premises, reserved by the said underlease. The plaintiff claimed to retain the said sum of 22*l.* 10*s.* in part satisfaction of the said sum of 27*l.* 16*s.* 8*d.* paid to the said Board of Works. On January 22, 1857, the defendant distrained the goods of the plaintiff on the said demised premises for the said sum of 22*l.* 10*s.*, and on the same day this action of replevin was

also that nothing herein contained shall be taken to affect any contract made or to be made between any owner and occupier of any house, building, or other property whereof it is or may be agreed that the occupier shall pay and discharge all rates, dues, and sums of money payable in respect of such house, building, or other property, or to affect any contract whatsoever between landlord and tenant."

(1) (1857) 2 C. B. (N.S.) 119.

(2) 2 C. B. (N.S.) at p. 123.

C. A. 1904

SKINNER v. HUNT.

brought in the county court by the plaintiff for such distress." The learned judge said he did not understand how the proceeding there could have been similar to that in *Skinner* v. *Hunt*.

The defendants applied for judgment or a new trial of the action.

J. A. Hawke, for the defendants. It is submitted that the learned judge was wrong in holding that when the payment was made by the tenant to the local authority the rent was discharged and the landlord's right to distrain was taken away. The decision gives no effect to the proviso at the end of s. 96, that no contract between landlord and tenant shall be affected by the section. If the landlord's right to distrain is taken away, the agreement between the landlord and the tenant is seriously affected. The landlord's only remedy would be to sue the tenant upon his covenant to bear the paving expenses. It is submitted that s. 96 does not provide that the payment by the tenant to the local authority shall be a payment of the rent; it only authorizes the tenant to deduct the amount which he pays from his rent; but this provision is not to affect any contract between landlord and tenant, and, therefore, when the tenant, as in the present case, has covenanted that he will bear the paving expenses, he has no right to deduct from the rent what he has paid, but the rent remains due to the landlord, and there is nothing in s. 96 which takes away his right to distrain: *Thompson* v. *Lapworth* (1); *Ryan* v. *Thompson* (2); *Sweet* v. *Seager* (3); *Home and Colonial Stores* v. *Todd* (4); Foa on Landlord and Tenant, 3rd ed. pp. 169, 170, 195.

[VAUGHAN WILLIAMS L.J. referred to *Tidswell* v. *Whitworth*. (5)]

In *Payne* v. *Burridge* (6) commissioners under a local Act were empowered to pave footways, and the costs of so doing were to be paid by the tenants of the adjoining houses, and a tenant who had paid the costs to the commissioners was authorized to deduct the amount which he had paid from his rent.

(1) (1868) L. R. 3 C. P. 149.
(2) (1868) L. R. 3 C. P. 144.
(3) 2 C. B. (N.S.) 119.
(4) (1891) 63 L. T. (N.S.) 829.
(5) (1867) L. R. 2 C. P. 326, 337.
(6) (1844) 12 M. & W. 727.

It was held that, notwithstanding such a payment by a tenant who had covenanted with his landlord to bear such a charge, the landlord could sue him for rent. In that case the statute was pleaded, but the tenant's covenant was held to be a good replication. If the Legislature had intended to take away the landlord's right of distress they would have said so in plain words.

S. G. Lushington, for the plaintiff. Under s. 96 the local authority are only entitled to require the tenant to pay to them his rent. It is the rent which he pays, and if the rent is paid the right to distrain for it must be extinguished. If there is a covenant by the tenant to pay the rent without deduction and he pays the local authority, his plea to an action by the landlord for rent would be payment or no rent in arrear.

[VAUGHAN WILLIAMS L.J. In such a case I think the plea would be, in substance, set-off; I have paid something for you under the provisions of the statute.]

In *Payne* v. *Burridge* (1) the liability was imposed directly on the tenant only. In *Sweet* v. *Seager* (2) the expenses were paid by the tenant before his rent became due. It could not be said that he had paid the rent, for no rent was then due. In the present case the payment was made by the tenant after the rent had become due. The liability of the tenant was for the rent only; the payment was so demanded by the borough council, and it was so made. The proviso in s. 96 saves only covenants in the lease. The right to distrain is a common law right incident to the rent, and that proviso does not affect it. The rent has been paid, and the right to distrain has gone. The landlord can sue the tenant on his covenant.

J. A. Hawke, in reply. In *Sweet* v. *Seager* (2) the sole question there was whether the payment was one which came within the tenant's covenant.

VAUGHAN WILLIAMS L.J. This is an action for wrongful distress, and the only question raised is whether at the moment of the distress any rent was due for which the landlord was

(1) 12 M. & W. 727. (2) 2 C. B. (N.S.) 119.

C. A. 1904

SKINNER v. HUNT.

Vaughan Williams L.J.

entitled to distrain. If there was any rent then due, there was nothing wrong in the distress. If no rent was then due, the distress was wrongful. It is said that no rent was then due, because by s. 96 of the Metropolis Local Management Act, 1862, power is given to a local authority who have incurred certain expenses to give notice to the tenant of the property in respect of which they were incurred not to pay his rent to his landlord without deducting from it the amount of those expenses, which the owner of the property was liable to pay, and calling upon him to pay the amount of the expenses to them to the extent of the rent due. The local authority have also, if the tenant does not pay, power to apply to the justices for an order for payment, and that order can be enforced by a statutory distress. The plaintiff says, "I was compelled to pay the local authority in this way, and the result is that I have pro tanto discharged the rent, and the defendants had no right to distrain for the full rent without deducting the amount which I have so paid."

The defendants, on the other hand, say it is not true that when the tenant pays the local authority under the provisions of s. 96 he is paying rent, but he is really paying an amount of expenses which the local authority is entitled to recover, and, as that is what he has paid, and the rent has not been paid, the right of distress remains. The question, therefore, is whether, having regard to the terms of this particular lease, the tenant has the right to deduct or set off this payment which he has made to the local authority when he is called upon by his landlord to pay the rent. The defendants say that he is not entitled to make this deduction, because there is in his lease a specific provision by which he has bound himself to bear this burden, and to indemnify his landlord against it.

The question then turns upon this—What is it which the tenant has paid? If the payment was made on account of rent, the landlord cannot afterward sue for it or recover it by distress. If, on the other hand, the payment was made on account of charges which the local authority were entitled to recover, then the rent has not been paid, and the tenant has no right to deduct or set off what he has paid from or against the rent,

having regard to the provisions of this lease which throw those charges on the tenant. The defendants, as I understand, accept the dictum of North J. in *Home and Colonial Stores* v. *Todd* (1), that if in a lease there is only a covenant by the tenant to pay the rent clear of all deductions except property tax, that would not be enough to prevent the tenant making the deduction authorized by s. 96, but that in order to prevent his doing so some specific covenant beyond the covenant to pay the rent without deduction would be needed—that is to say, a specific covenant relating to the particular subject-matter. [The Lord Justice read the covenant in the lease, and continued:—] So far as the lease is concerned, it is to my mind plain that if the effect of the payment by the tenant to the local authority has not been to discharge the rent, but merely to give him a right of deduction, if he attempted to plead that right by way of set-off against a claim for rent, it would be a perfectly good answer to the plea to point to the covenant by which the tenant undertakes as between himself and his landlord to bear the ultimate burden of these charges.

It remains now to consider the words of s. 96. I will deal with the proviso first. [The Lord Justice read the proviso.] The result of that is that the covenant by the tenant to indemnify the landlord against the stipulations set forth in the schedule to the lease is by the very terms of the proviso not to be affected by anything in the section. That covenant remains in full force, but still that will not help the landlord if it is true that the payment to the local authority constitutes a payment of rent. Does, then, that payment under the first part of the section constitute a payment of rent? In my opinion, that which the local authority are entitled to require under the first part of the section, whether from the owner or the occupier, is costs and expenses, and I doubt whether the proper receipt for them to give would be a receipt for rent. They could only, as it seems to me, give a receipt for that of which they were entitled to demand payment—namely, costs and expenses, which the owner or occupier is liable to pay.

The observations of Willes J. in *Tidswell* v. *Whitworth* (2)

(1) 63 L. T. (N.S.) 829. (2) L. R. 2 C. P. 326, at p. 337.

C. A. 1904

SKINNER v. HUNT.

Vaughan Williams L.J.

in which he pointed out a difference between the Manchester Improvement Act, 1851, which he was then considering, and the Metropolis Local Management Act, 1855, were, in my opinion, well founded. The learned judge pointed out that under the latter Act "the remedy is not given directly against the landlord, but only through the tenant; whereas here not only is the duty imposed upon the landlord, but it is a direct obligation upon him." In that respect the Act of 1862 resembles the Manchester Act. When I first read s. 96, I was inclined to think that the words "out of the rent" in the second clause must be read in connection with the word "pays." But on consideration, having heard the argument, I think that they should be read in connection with the word "deduct." And I may point out that the words which follow indicate that that which is paid is not paid as rent, for the tenant is allowed to deduct what he pays "as if the same had been actually paid to such owner as part of such rent." I think, therefore, that the payment by the tenant is a payment of costs and expenses to which the local authority are entitled, and not a payment of rent. And, if it is not a payment of rent, the landlord has not lost his right of distress. There is nothing in the Act which takes away from the landlord any right of distress by reason of the payment by the tenant to the local authority under the Act. If the rent is still due, then, subject to the question whether the tenant has any right of set-off or deduction, the right of distress remains.

I do not think s. 96 is very easy to construe, but I prefer the view of the section taken by Willes J. in *Thompson* v. *Lapworth* (1), in part of his judgment not material to the decision of the question there raised, to that which appears to have been the opinion of Bovill C.J. in *Ryan* v. *Thompson*. (2) Willes J. said: "The effect, therefore, of the 96th section is to give a remedy against the tenant, who is to be allowed to recoup himself out of the rent due from him, unless there be some agreement between himself and his landlord to the contrary." In my judgment there is an agreement to the contrary in the present lease—namely, the tenant's

(1) L. R. 3 C. P. 149, at p. 157. (2) L. R. 3 C. P. 144, at p. 147.

covenant, to which I have already referred. Bovill C.J. in *Ryan* v. *Thompson* (1) said: "What the plaintiff's counsel had to establish was, that the landlord's right to distrain was taken away. It has been ably argued that the mere giving of the notice by the vestry clerk to the tenant amounts to a discharge of the rent, and to payment pro tanto. I do not, however, find any language in the Act to warrant that position. The words are, 'the owner shall allow such occupier to deduct the sums of money *which he so pays* out of the rent from time to time becoming due in respect of the premises, as if the same had been actually paid to such owner as part of such rent.' I find no prohibition, either express or implied, against the landlord's pursuing his ordinary remedy where the rent has not been paid. And I see no hardship on the tenant in this." Bovill C.J. appears to have thought that, although the notice did not constitute a discharge of the rent and payment pro tanto, notice when followed by payment did constitute a discharge of the rent and payment pro tanto, and he said he saw no hardship on the tenant in that, for he went on to say, "When a notice has been given, and the rent is due, he must pay the amount to the vestry. He cannot pay it to the landlord. In this case he did neither. He has therefore not brought himself within the Act." These expressions point to a payment by the tenant to the local authority being a payment in discharge of the rent; but on the whole I think that the other view is right.

I do not wish to go back to such obsolete things as rules and forms of pleadings, but I have looked at a good many of those cases in which the plea was raised of payment under a statute, such as the one now in question, of sums of money which primarily the landlord had to bear, and in respect of which the tenant, if he paid them, was given a right of deduction very like that given by s. 96, cases also in which the liability of the tenant to pay was limited to the amount of rent due, and I have found that the plea of the statute and a right to set-off under it was often successfully followed by a replication that the tenant had by the lease undertaken the responsibility

(1) L. R. 3 C. P. 144, at p. 147.

C. A. 1904

SKINNER v. HUNT.

Vaughan Williams L.J.

for the payments sought to be set off, and to indemnify the landlord against them. Maule J. in *Franklin* v. *Carter* (1) describes the tenant's right to deduct landlord's property tax as a right of set-off. The learned judge said: "Then comes the question whether money paid by a tenant on account of his landlord under that Act" (the Income Tax Act, 5 & 6 Vict. c. 35), "may be set off, or deducted, in an action brought by the landlord for the recovery of rent." It is immaterial for this purpose whether the question arises in an action for recovery of rent, or in an action for distress for rent put in by the landlord followed by replevin, or by an action for illegal distress.

Under these circumstances I think that this appeal should be allowed.

I wish to add that I agree with Ridley J. in his criticism based on the dates in *Sweet* v. *Seager*. (2)

STIRLING L.J. I am of the same opinion, and for the same reasons; but, as we are differing from the learned judge, I will state shortly the grounds of my decision.

The question arises on the construction of s. 96 of the Metropolis Local Management Act, 1862. By s. 105 of the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), certain paving expenses were charged upon the owners of property adjoining the road in respect of which the expenses were incurred, and by s. 77 of the Act of 1862 the amount of the expenses was made recoverable either by action or in a summary manner. Then s. 96 of the Act of 1862 gives a remedy against the occupier as well as the owner. The result is that in respect of these costs and expenses the occupier may be sued or he may be summoned before the justices, and the expenses may be recovered from him in that way. Then it is provided that the owner shall allow the occupier to deduct from his rent what he has so paid. It is contended, on the one hand, that these words are to be treated as shewing that what the local authority recover from the occupier is actually rent and nothing else. On the other hand, it is contended

(1) (1845) 1 C. B. 750, at p. 759. (2) 2 C. B. (N.S.) 119.

that what is recovered from the occupier is not rent, but simply the amount of the costs and expenses which the occupier is liable to pay, with the right as against his landlord to deduct the amount which he pays from his rent. The fact that the occupier is not bound to pay more than the amount of the rent due from him is relied upon as shewing that what he pays is really rent, but on the best consideration I have been able to give to the section it does not seem to me to go so far as that. In the first place, the Act does not in express terms say that what is to be paid by the occupier is rent. The language rather points in the opposite direction, for he is to deduct it "as if the same had been actually paid as part of the rent." In the next place, the local authority are not put in the position of landlords. They can summon the occupier, but they cannot distrain. That is clear; and in my judgment the local authority could not give a receipt for rent, but only for the costs and expenses which the occupier was liable to pay. I can see nothing in the Act which compels us to regard the payment by the occupier as a payment of rent, and the better view, in my opinion, is that the tenant is merely made liable to pay costs and expenses, which in the first instance ought to fall upon the landlord, to the extent to which any rent may be due from him, and to deduct the amount which he pays from the rent.

Then comes the proviso at the end of s. 96. In the present case the tenant is by his own covenant bound to make this very payment to the local authority, and to indemnify his landlord against it, so that he is precluded from making any such a deduction as he claims, and the rent remains due.

The appeal, therefore, should be allowed.

COZENS-HARDY L.J. I agree, and for the same reasons. In construing s. 96 the important thing is to see what it is that the local authority can require to be paid by the tenant. I can see nothing to shew that they can sue the tenant for rent. All that they can require from him is the payment on account of costs and expenses of a sum which is to be measured by the rent due from him. A receipt could not be

C. A. 1904

SKINNER v. HUNT.

Cozens-Hardy L.J.

given by the local authority for rent. The only receipt which could be properly given by them would be a receipt for the whole or part of the improvement charge, not exceeding the rent due to the landlord. If that is the true view of the section it merely comes to this—that authority is given to a tenant, who has paid the improvement charge to an amount not exceeding the rent due to the landlord, to deduct that amount from the rent. But it is also provided that nothing in the section is to affect any contract between landlord and tenant. When therefore there is, as here, an express covenant by the tenant to pay these charges, and to pay the rent without deducting anything in respect of them, then in my opinion the tenant is not entitled under s. 96 to say to his landlord that he has deducted from his rent that which he has paid to the local authority. The answer of the landlord would be that he is not entitled to do so, and that the proviso neutralizes the earlier part of the section.

THE COURT ordered that judgment should be entered for the defendants on the claim and on the counter-claim for 20*l*.

Appeal allowed.

Solicitors: *Alexander Pope, for H. R. Jones, Wandsworth; Todd, Dennes & Lamb.*

W. L. C.

AKROKERRI (ATLANTIC) MINES, LIMITED *v.* ECONOMIC BANK.

1904
May 18, 19; *June* 6.

Banker — Cheque — Protection of Collecting Banker—Customer credited in Ledger with amount of Cheque before Clearance—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 82.

Where the customer of a bank delivers to the banker for collection a crossed cheque to which he has no title, the fact that the banker credits the customer in the bank ledger with the amount of the cheque before it is cleared does not deprive the banker of the protection afforded by s. 82 of the Bills of Exchange Act, 1882.

TRIAL before Bigham J. in the Commercial Court.

The action was for the proceeds of certain cheques as money had and received to the plaintiffs' use, or alternatively for damages for the conversion of the cheques.

The plaintiff company had at their office in London a clerk named Nobbs, who acted as their secretary. From time to time Nobbs fraudulently procured the directors to sign cheques drawn on the company's bankers and made payable to the order of different persons with whom the company were in the habit of doing business. The cheques were crossed generally, and then handed to Nobbs to be forwarded to the different payees. Nobbs, however, kept them for himself, forged the indorsement of the payees, and then handed them to the defendant bank, by whom they were forwarded to the plaintiffs' bankers for presentation and payment. They were duly paid, and Nobbs received the proceeds from the defendants. Nobbs was prosecuted to conviction for the frauds. To assist him in carrying out his frauds Nobbs had opened an account with the defendants, and the better to conceal his frauds he opened it in a false name—that of Evans. The defendant bank carries on a business which may be described as that of a deposit or savings bank. By the memorandum of association its objects are described as being "to carry on the business of a bank, but so that the company shall not engage in any discount operations or make

1904

AKROKERRI (ATLANTIC) MINES, LIMITED v. ECONOMIC BANK.

loans or permit any overdrafts"; and the investments which it is permitted to make are limited to certain selected statutory trustee securities. When Nobbs opened his account he read and signed an application form, which contained, amongst other things, a notice that no bills would be discounted and that cheques would not be paid against until cleared. The course pursued when Nobbs brought the stolen cheques to the defendants was this. He filled up a paying-in slip and handed it, together with the cheque, to the defendants' counter clerk; this clerk entered the amount in a book kept for such purposes at his desk. The clerk then gave the cheque and the paying-in slip to another clerk, who entered the particulars in a book called the waste-book. The waste-book clerk then put the cheque into a box and handed the paying-in slip to the ledger clerk, who posted the amount there and then in the ledger to the credit of the Evans (Nobbs') account. The box was used as a receptacle for all cheques brought to the bank by customers, and it was cleared several times in each day by a messenger, who took the cheques to the bank of Messrs. Williams Deacon & Co., to whom the defendants specially crossed the cheques, the defendants not being themselves a clearing bank. Beneath the special crossing the defendants by a rubber stamp impressed on the cheques the words "account Economic Bank." Thus when the cheques reached Williams Deacon & Co.'s hands they were specially crossed to those bankers, and bore in addition the words mentioned. It appeared that the defendants had two accounts open with Messrs. Williams Deacon & Co.—one a current account, which was always in credit, and the other a loan account, which was always in debit. Williams Deacon & Co. always held securities belonging to the defendants exceeding in value the debit to the loan account. These securities were deposited specifically to secure that account. There were occasions when the amount to the debit of the loan account exceeded the amount to the credit of the current account. On the evening of the day on which Williams Deacon & Co. received the cheques they attended with them at the Clearing House and cleared them. By half-past nine on the next morning the defendants

were informed by Williams Deacon & Co. whether any, and, if any, which, of the cheques had been dishonoured, and if no such advice arrived the defendants assumed that the cheques had been duly honoured by the banks on which they were drawn; and it was then, and not till then, that the defendants entered the amounts to the credit of the customers in the pass-books. The entries, however, though in fact made the day after the cheques were received, were dated as of the day of the receipt of the cheques. Thus Nobbs never got a credit entry in his pass-book, nor was he allowed to draw against a cheque so handed to the defendants until after the defendants had received the proceeds of the cheque. The defendants acted throughout in good faith and without negligence. (1)

Scrutton, K.C., and *Bateson*, for the plaintiffs. The defendants are clearly liable to account for the proceeds of these cheques unless they are protected by s. 82 of the Bills of Exchange Act, 1882. But that section does not apply, because the defendants did not receive payment for their customer, but on their own account. By crediting Nobbs with the amount of the cheques in their ledger before they were cleared they became purchasers of the cheques, and received the money, not as collecting agents, but as holders for value. In *Capital and Counties Bank* v. *Gordon* (2), where bankers credited a customer with the amounts of cheques as soon as they were handed in by him to his account, and allowed him to draw against the amounts so credited before the cheques were cleared, it was held that the bankers were not protected. But the material fact there was not that the bank allowed the customer to draw before clearance, but that they credited him with the amount before clearance. It was there conceded that a bank which, without crediting the customer with the value of a cheque before collection, allows him to overdraw his account in view of the anticipated credit is not outside the protection of the section. Moreover, the section only applies to bankers who collect directly from the banks on

(1) The above statement of the facts is taken from the judgment.

(2) [1903] A. C. 240.

1904

AKROKERRI (ATLANTIC) MINES, LIMITED v. ECONOMIC BANK.

which the cheques are drawn. Here the defendants did not do so, but sent them to Williams Deacon & Co., with whom they had an account. And as the balance on their loan and current accounts taken together were at times in favour of Williams Deacon & Co., they exposed the cheques to the risk of a lien for that balance.

Further, assuming that the defendants were agents for collection and not holders for value, s. 82 only protects them from liability arising from the fact "of having received such payment." Here the defendants did more than receive payment. Before sending the cheques to Williams Deacon & Co. they changed the general crossing to a special crossing to Williams Deacon & Co. By s. 78 a crossing is a material part of the cheque, and it is unlawful to alter the crossing "except as authorized by this Act." It may be contended that s. 77, sub-s. 3, which provides that "where a cheque is crossed generally the holder may cross it specially," authorized the special crossing in this case. But "holder" there means holder for value, which ex hypothesi the defendants were not. Again, the stamping of the words "account Economic Bank" on the cheques was itself a conversion.

J. A. Hamilton, K.C., G. Wallace, and *A. M. Talbot,* for the defendants. The defendants are protected by s. 82. They received the money as collecting agents for Nobbs. That they did not purchase the cheques is conclusively shewn by the fact that Nobbs was not allowed to draw against the cheques until they had been cleared. The fact that the defendants credited him with the amount in the ledger is immaterial. That entry would not be communicated to the customer, and did not bind the bank. The defendants were not the less mere collecting agents because they collected the money through Williams Deacon & Co. They could not conveniently do otherwise than collect it through another banker, not being themselves a clearing bank. If an agent employs a sub-agent, he does not lose his protection as a collecting banker. If what the defendants did was more than the collection of cheques, it was a "discount operation" on the part of the defendants' clerks, and such an operation being outside the defendants' memo-

randum of association was ultra vires, and the defendants cannot be held liable. With regard to the crossing of the cheques specially to Williams Deacon & Co., that is justified by s. 77, sub-s. 3, for the term "holder" is defined by s. 2 to include "bearer." If payment is in fact received for the customer, it is immaterial what intervening steps were taken to enable the payment to be so received.

Scrutton, K.C., in reply. If the term "holder" in s. 77, sub-s. 3, does not mean "holder for value," sub-s. 6 of that section, which provides that "where an uncrossed cheque or a cheque crossed generally is sent to a banker for collection, he may cross it specially to himself," is superfluous. Indeed, the change of language seems to suggest that a banker for collection is not a holder within the meaning of that section.

Cur. adv. vult.

June 6. BIGHAM J. The action is brought to recover the amounts of certain cheques as money had and received to the plaintiffs' use, or, alternatively, damages for the conversion of the cheques, and the question which I have to determine is whether the defendants are entitled to the benefit of the statutory defence provided by s. 82 of the Bills of Exchange Act, which enacts that, "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." The facts are as follows: [The learned judge stated the facts as above set out.] On the foregoing facts, it is quite clear that at common law the defendants by what they did rendered themselves liable to account to the plaintiffs for the proceeds of the cheques. They had no more right as against the plaintiffs to deal with the cheques than had the thief from whom they got them. Then arises the question whether they have a statutory defence, and that depends upon whether the facts bring them within the protection afforded by s. 82 of the Act. Now it is clear that

1904

AKROKERRI (ATLANTIC) MINES, LIMITED v. ECONOMIC BANK.

Bigham J.

the cheques were crossed cheques when they were received by the defendants. They were, therefore, of the kind to which the section applies. It is also clear that the defendants were bankers within the meaning of the section, and that they acted in good faith and without negligence. So far, therefore, the defendants are within the terms of the section. What is it, then, that remains to be considered? Two things. The first, whether when the defendants received payment they did so for their customer; the second, whether there are any circumstances outside the receipt of the payment which render them liable for the conversion. The section says that, in order to afford a protection to the defendant banker, the payment must have been received by him for a customer; and the section then limits the protection to the liability incurred by reason of such receipt. Then, first, did the defendants receive the payment for their customer? The expression "for a customer" has been often discussed, and its meaning has now been made fairly plain by judicial interpretation. Money is received for a customer in those cases only where the banker acts as a mere agent to collect. Thus it is that if the banker as between himself and his customer becomes the holder of the cheque for value before he collects it he does not receive the payment for his customer; he receives it for himself. The question, then, resolves itself into this—Did the defendants receive the payments as mere collecting agents for Nobbs? It is argued that they did not, because they gave Nobbs credit for the value of the cheques in their ledger before they sent them to Williams Deacon & Co. for collection, and so, it is said, made themselves holders of the cheques for value. But, in my opinion, the entries in the bank's ledgers did not make the bank holders for value. The entries neither conferred any right on Nobbs to draw the money out of the bank, nor did they fix the bank with any liability to pay the money to him. It might have been different if the entries had been made in the pass-book, for that book belongs to the customer, and the entries made in it by the bank are statements on which the customer is entitled to act. Suppose, after the ledger entries were made, but before the cheques were sent

to Williams Deacon & Co., Nobbs had asked the defendant bank to return him the cheques, could the bank have refused to comply with his request? Could they have said, "No; the cheques are ours, for by entries in our ledger of which you know nothing we have given you credit for the amounts, and so have made ourselves holders for value"? I think not. Nobbs, having regard to the terms on which the business was carried on, would have been entitled to say that he had never assented to any transfer of the cheques, and that therefore they were still his. In truth, notwithstanding the ledger entries, no credit was given to Nobbs; nor was it intended that he should have credit; and, if Nobbs had demanded the money, the defendants would have been entitled to refuse to pay it to him. I think, therefore, that the defendants, in forwarding the cheques to Williams Deacon & Co., and so obtaining the money, were acting as mere agents to collect and were receiving the payment for their customer within the meaning of the section of the Act. The next question is—Have the defendants done anything more than receive payment, so as to make themselves liable in trover? It is said that they have. It is argued that, in sending the cheques to Williams Deacon & Co.'s bank, they subjected them to a lien in the hands of that bank by reason of the existence of the loan account, the debit to which at times exceeded the credit to the current account, and that this constituted a conversion. This is, in my opinion, a fanciful point. Williams Deacon & Co. received the cheques for the purpose of collection merely, and, therefore, could not use them except to present them for payment. They could not have detained them; they were bound at once to present them for payment. Moreover, Williams Deacon & Co., as bankers, would know that the cheques paid in to them might be the property of the defendant bank's customers (as, in fact, these particular cheques were), and they could have no right to exercise a lien on securities which were not the property of the defendants. Then it was said that the defendants had made an unauthorized alteration in a material part of the cheques by changing the general crossing into a special crossing. No doubt the

1904

AKROKERRI (ATLANTIC) MINES, LIMITED v. ECONOMIC BANK.

Bigham J.

Act of Parliament by s. 78 makes the crossing a material part of a cheque, and forbids any addition to or alteration of it except as authorized by the Act. But s. 77, sub-s. 3, expressly provides that where a cheque is crossed generally the holder may cross it specially. It was argued that this authority does not extend to mere agents for collection, and that "holder" must be read as meaning only holder for value. I see no reason, however, for limiting the operation of the section in such a way. Holder does not necessarily mean a holder for value. The expression includes every person who is in lawful possession of the instrument, and therefore includes an agent for collection. Lastly, it was said that the defendants had made an unlawful addition to the crossing by stamping upon the cheque the words "account Economic Bank." But in my opinion these words are not in any sense an addition to the crossing. A crossing is a direction to the paying bank to pay the money generally to a bank or to a particular bank, as the case may be, and when this has been done the whole purpose of the crossing has been served. The paying bank has nothing to do with the application of the money after it has once been paid to the proper receiving banker. The words "account A.B." are a mere direction to the receiving bank as to how the money is to be dealt with after receipt. The truth is that all that the defendants did from the moment they received the cheques down to the time when they received the payment was done in the ordinary course of business for the purpose of safely and properly obtaining payment; and as s. 82 protects the banker from the common law liability which the receipt of the payment would involve, it also of necessity protects him from any consequences which might otherwise flow from the steps properly taken to obtain the payment. This is made quite clear in the opinion of Lord Macnaghten delivered in the House of Lords in the case of *Capital and Counties Bank* v. *Gordon* (1), where he says: "The only question, therefore, is, Did the banks receive payment of these cheques for their customer? If they did, it is obvious that they are relieved from any liability which perhaps might otherwise attach to

(1) [1903] A. C. 240, at p. 244.

some preliminary action on their part taken in view and anticipation of receiving payment. The section would be nugatory—it would be worse than nugatory—it would be a mere trap if the immunity conferred in respect of receipt of payment, and in terms confined to such receipt, did not extend to cover every step taken in the ordinary course of business and intended to lead up to that result." There will be judgment for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Stibbard, Gibson & Co.*
Solicitors for defendants: *Pritchard & Sons.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.

1904

May 6, 7.

HUBBACK *v.* BRITISH NORTH BORNEO COMPANY.

Practice—Costs—Payment into Court of a lump Sum with Denial of Liability as to part of Claim and Admission of Liability as to part—Cost of Issues found for Plaintiff—Issue not going to the whole Cause of Action—Rules of Supreme Court, Order XXII., *rr.* 1, 6.

In an action for wrongful dismissal the plaintiff claimed, amongst other things, three months' full pay and nine months' half pay. The defendants admitted liability for three months' full pay and six months' half pay, and whilst denying any further liability paid a sum of money into court. At the trial the plaintiff obtained a verdict and judgment for a sum in excess of the sum paid into court. Upon an application by the defendants for judgment or a new trial, the Court held that the plaintiff was entitled to less than the sum paid into court and gave judgment for the defendants, but they decided the issue of six months' or nine months' half pay in favour of the plaintiff:—

Held, on the principle of *Wagstaffe* v. *Bentley*, [1902] 1 K. B. 124, that the defendants, while entitled to the general costs of the action, must pay the costs of the issue on which they had failed, although it was not an issue going to the whole cause of action.

Semble, *per* Cur.: Under Order XXII. payment into court of a lump sum with a denial of liability as to part of the claim and an admission of liability as to part cannot be pleaded as a defence to an action.

THIS was an application by the defendant company for judgment or a new trial in an action tried before Lawrance J. and a special jury.

C. A. 1904

HUBBACK v. BRITISH NORTH BORNEO COMPANY.

In July, 1901, the plaintiff entered the service of the defendant company as Superintendent of Public Works for the State of British North Borneo and Colony of Labuan upon the terms of a letter dated May 26, 1901. This letter stated that the plaintiff's salary was to be 325 dollars a month, and that in November, 1902, the plaintiff was to be allowed three months' leave on full pay and six months' leave on half pay, but the plaintiff alleged that "six" was a clerical error for "nine." The letter contained no provision as to the termination of the employment. In October, 1902, the plaintiff, upon the terms of this letter, obtained leave of absence. In February, 1903, while the plaintiff was still on leave, the defendant company dismissed the plaintiff from their service. The plaintiff brought this action for damages for breach of contract.

The particulars of damage alleged by the plaintiff in his statement of claim were given under the following heads: (*a*) three months' full pay and nine months' half pay whilst on leave; (*b*) his fare from Singapore to London and back; and (*c*) six months' pay in lieu of notice; the total amount claimed under these heads being 668*l.* 7*s.* 6*d.*; and he also claimed damages for wrongful dismissal.

The defendant company by their defence admitted the letter of employment, but denied that "six" was a clerical error for "nine." They also admitted their liability for three months' full pay and for six months' half pay, and save as above they did not admit any of the allegations in the statement of claim. The concluding paragraph of the defence stated that the defendant company, whilst denying any liability to pay to the plaintiff by way of compensation or damage or under the agreement any money beyond the sums admitted by their defence, for the sake of peace brought into court the sum of 500*l.*, and alleged that such sum was enough to satisfy the whole of the plaintiff's claim.

The jury gave a verdict in favour of the plaintiff for 781*l.* damages; and judgment was entered for the plaintiff for that amount and costs.

Upon the appeal the Lords Justices came to the conclusion that the plaintiff was entitled to nine months' half pay in

addition to the three months' full pay which was admitted; but they held that notice might be given to the plaintiff at the date of the commencement of his leave, so long as it did not interfere with his leave, that in the circumstances three months' notice was a reasonable notice, and that the plaintiff was not entitled to any compensation in addition to the nine months' half pay; and in effect they decided all, or substantially all, the issues in the action except the issue as to the nine months' half pay in favour of the defendant company, with the result that the sum to which the plaintiff was entitled was reduced to 365*l.* 12*s.*, to which was added a further sum of 62*l.* 10*s.*, which the defendant company as a matter of grace were willing to allow to the plaintiff for his passage from Singapore to London.

The 500*l.* being more than sufficient to meet the plaintiff's claim, the Court directed judgment to be entered for the defendant company.

A question then arose as to the costs of the action.

Muir Mackenzie (*Scrutton, K.C.*, with him), for the defendant company. The defendant company ought to be allowed the whole costs of the action. The only issue upon which the plaintiff has succeeded is the issue of six months' or nine months' half pay. As a general rule where money is paid into court under Order XXII., rr. 1, 6 (1), and the money is more than

(1) Rules 1 and 6 of Order XXII., so far as material, provide as follows:—

"1. Where any action is brought to recover a debt or damages, ... any defendant may, before or at the time of delivering his defence, ... pay into court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action in respect of which the payment is made; or he may, with a defence denying liability, ... pay money into court which shall be subject to the provisions of rule 6.

"6. When the liability of the defendant, in respect of the claim or cause of action in satisfaction of which the payment into court has been made, is denied in the defence, the following rules shall apply:—

"(*c*) If the plaintiff does not accept, in satisfaction of the claim or cause of action in respect of which the payment into court has been made, the sum so paid in, but proceeds with the action in respect of such claim or cause of action, or any part thereof, the money shall remain in court and be subject to the order of a Court or a judge, and shall not be paid out of court except in pursuance of an order. If the plaintiff proceeds with the

C. A. 1904

HUBBACK v. BRITISH NORTH BORNEO COMPANY.

sufficient to meet the plaintiff's claim, but the plaintiff has succeeded on certain issues, the defendant is allowed the general costs of the action, but must pay the costs of those issues upon which the plaintiff has succeeded: *Wagstaffe* v. *Bentley* (1); *Wheeler* v. *United Telephone Co.* (2); *Dunn* v. *South Eastern and Chatham Ry. Co.* (3) But that principle only applies where the issues upon which the plaintiff succeeds are issues going to the whole cause of action.

Here the only issue upon which the plaintiff has succeeded is not an issue going to the whole cause of action; it is a mere question of quantum. The defence raised only one issue which went to the whole cause of action, namely, whether the money paid into court was a sufficient answer to the plaintiff's claim. That was the sole defence to the action, and that question has been decided in favour of the defendant company.

McCall, K.C., and *P. Rose-Innes*, for the plaintiff.

VAUGHAN WILLIAMS L.J. The defendant company here have availed themselves, or have purported to avail themselves, of the provisions of Order XXII., and the particular part of those provisions of which they sought to avail themselves is rule 6. [The Lord Justice read the rule, and continued:—]

It turns out as the result of the trial that the sum paid into court is larger than the sum which the plaintiff has recovered in this action. We have to say what is to be done about the costs. On behalf of the defendant company it is argued that if they are given their full rights under Order XXII. they ought to have the whole costs of the action, and that they ought not to be ordered to pay the costs even of those issues on which they have failed. It is said that the reason why the

action in respect of such claim or cause of action, or any part thereof, and recovers less than the amount paid into court, the amount paid in shall be applied, so far as necessary, in satisfaction of the plaintiff's claim, and the balance (if any) shall, under such order, be repaid to the defendant."

(1) [1902] 1 K. B. 124.
(2) (1884) 13 Q. B. D. 597
(3) [1903] 1 K. B. 358.

defendant company ought not to be ordered to pay the costs of those issues on which they have failed in accordance with the decision in *Wagstaffe* v. *Bentley* (1) is this—that in *Wagstaffe* v. *Bentley* (1) the issues as to which the defendant failed were issues going to the whole cause of action, and that under those circumstances it was right that the defendant, although he had paid more than sufficient into court, should have to pay the costs of those issues, whereas in the present case, the defendant company have not been defeated on any issue going to the whole cause of action ; and it is contended that under those circumstances they have not been defeated as to any defence and ought not to be made to pay any costs. I see nothing in the authorities to compel us to come to such a conclusion. In my opinion good sense would lead us to the conclusion, if we are at large in the matter, that the defendant company ought to bear the costs of any issue as to which they have failed. In this case it is the issue as to six months' or nine months' pay. So far from there being anything in the Judicature Acts or in the Rules to prevent us from doing this, I think that Order LXV. shews the contrary. I wish to add that I have great doubt as to whether the defendant company are entitled to the defence they have pleaded as being a defence sanctioned by these Rules. Order XXII. makes provision for two different things—payment into court admitting liability and payment into court with a denial of liability. If a defendant pays money into court admitting liability, then the plaintiff may in respect of that cause of action take it out at any time. If the defendant pays in with a denial of liability, the money remains in court until the action has been tried. What is sought to be done here is to make a payment on both bases, and by so doing to prevent the plaintiff from taking out any part of the money, as he would be entitled to do if the money in respect of a particular liability was paid in with an admission of liability. I can find nothing in the Judicature Acts or in the Rules to sanction that. The defendant company will be allowed the general costs of the action; but they must pay the costs of any issue or issues on which the plaintiff has succeeded; the

(1) [1902] 1 K. B. 124.

C. A. 1904

HUBBACK v. BRITISH NORTH BORNEO COMPANY.

defendant company will also have the costs of the application for a new trial.

STIRLING and COZENS-HARDY L.JJ. concurred.

Judgment accordingly.

Solicitors: *Stephenson, Harwood & Co.*; *Brandon & Nicholson.*

H. B. H.

C. A. 1904 *April* 29.

[IN THE COURT OF APPEAL.]

In re GASKELL.

Bankruptcy—Discharge—Conditional Order—Refusal of Bankrupt to consent to Condition—Repetition of Order—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 8, *sub-s.* 2—*Bankruptcy Rules*, 1886 *and* 1890, *r.* 240.

Where under s. 8, sub-s. 2, of the Bankruptcy Act, 1890, the Court grants an order of discharge conditionally upon the bankrupt consenting to judgment being entered against him by the official receiver for a part of the unsatisfied balance of the debts provable in the bankruptcy, and the bankrupt refuses to consent, and the official receiver applies under rule 240, sub-rule 3, of the Bankruptcy Rules, 1886 and 1890, to have the order revoked, it is not competent for the Court, by repeating its former order, to suspend the discharge until the bankrupt consents; but when the order is revoked, the Court is not bound as the only alternative to make an order suspending the discharge of the bankrupt for two years, but may make such other order as it thinks fit.

APPEAL from an order of one of the registrars refusing an order of discharge.

T. K. Gaskell, who was a captain in the Indian army, was adjudicated a bankrupt on April 22, 1903, upon his own petition. His liabilities amounted to 1625*l.* 16*s.* 3*d.*, and his assets had hitherto realized 61*l.* 17*s.* 8*d.*, and he had since received a legacy of about 12*l.* The bankrupt attributed his failure entirely to his liability for damages and costs under a judgment in an action for breach of promise of marriage, the plaintiff in that action being the only scheduled creditor. The bankrupt's full pay and allowances when on active service

amounted to 460*l.*; he had no private means. The official receiver reported that the bankrupt's assets were not equal to 10*s.* in the pound.

In November, 1903, the bankrupt applied for his discharge. The registrar, in giving judgment on November 26, said that this was not a case in which he ought to make any order affecting the bankrupt's pay, and he granted an order of discharge under s. 8, sub-s. 2, of the Bankruptcy Act, 1890, upon condition that the bankrupt should, before the signing of the order, consent to judgment being entered against him in the King's Bench Division for 600*l.* and 1*l.* 10*s.* for costs, the judgment not to be enforceable without leave of the Court. The bankrupt not having given the requisite consent within a month of the making of this order, the official receiver applied under rule 240, sub-rule 3, of the Bankruptcy Rules, 1886 and 1890, for a rehearing of the bankrupt's application for his discharge. Upon the rehearing the registrar, on February 25, repeated his former order subject to a variation in the mode of satisfying the judgment. This order of February 25 provided that the judgment should be satisfied when the official receiver should have received, together with the assets already realized or to be realized, a sum sufficient to pay 7*s.* 6*d.* in the pound on the provable debt, and that this sum should be paid out of the future earnings or after-acquired property of the bankrupt, after setting aside thereout for his support a yearly sum equivalent to the pay and allowances of the bankrupt for the time being as a captain of the Indian army.

The bankrupt by his counsel stated that he would not consent to judgment, and asked that his discharge might be granted subject to a suspension for two years; but the registrar intimated that the bankrupt would not obtain his discharge until he consented, and declined to make any further order, and this refusal of the registrar was incorporated in the formal order. This order, except in so far as the form of the order was varied to meet the case of the bankrupt refusing to consent to judgment, followed Form 63*a* in the Appendix to the Rules.

The bankrupt appealed from the order of November 26 as

C. A. 1904

GASKELL, *In re.*

varied by the order of February 25, and asked that an order might be made suspending his discharge for two years only.

Reed, K.C., and *Haydon*, for the bankrupt. The bankrupt cannot consent to the payment of a sum which there is no possibility of his being able to pay, and he can only be required to consent as a condition of obtaining his immediate discharge. If he refuses his consent, the Court must revoke the order and make another order: rule 240, sub-rule 3, of the Bankruptcy Rules, 1886 and 1890. (1) It is not competent for the Court to make the same order over and over again until he does consent. In the circumstances of the case it is submitted that the proper order to make is to suspend his discharge for two years.

[They were stopped.]

Muir Mackenzie, for the creditor. Under s. 8, sub-s. 2 (2), the Court has power to make this order.

(1) Rule 240 provides as follows:—

"(1.) Where the Court grants an order of discharge conditionally upon the bankrupt consenting to judgment being entered against him by the official receiver or trustee for the balance or any part of the balance of the debts provable under the bankruptcy which is not satisfied at the date of his discharge, the order of his discharge shall not be signed, completed, or delivered out until the bankrupt has given the required consent in the Form No. 64 in the Appendix.

"(3.) If the bankrupt does not give the required consent within one month of the making of the conditional order, the Court may, on the application of the official receiver or trustee, revoke the order or make such other order as the Court may think fit."

(2) Sect. 8 of the Bankruptcy Act, 1890, so far as material, provides as follows:—

"(2.) On the hearing of the application the Court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs (including a report as to the bankrupt's conduct during the proceedings under his bankruptcy), and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property: Provided that the Court shall, on proof of any of the facts hereinafter mentioned, either—

"(i.) refuse the discharge; or

"(ii.) suspend the discharge for a period of not less than two years; or

"(iii.) suspend the discharge until a dividend of not less than ten shillings in the pound has been paid to the creditors; or

"(iv.) require the bankrupt as a

[VAUGHAN WILLIAMS L.J. The bankrupt having declined to consent to the condition upon which the order of discharge was made, he loses the advantage of his discharge subject to that condition, but the Court cannot go on making the same order over and over again.]

This order is substantially in Form 63*a* in the Appendix.

VAUGHAN WILLIAMS L.J., having ascertained from the official receiver, who was in Court, that there was no other reason beyond the deficiency in the bankrupt's assets for refusing the discharge, gave judgment as follows:—I do not wish it to be supposed that where a conditional order of discharge has been made, and the bankrupt refuses his consent to the condition, and the official receiver applies to the Court under rule 240, sub-rule 3, to revoke the order, and the order is revoked, the

condition of his discharge to consent to judgment being entered against him by the official receiver or trustee for any balance or part of any balance of the debts provable under the bankruptcy which is not satisfied at the date of the discharge, such balance or part of any balance of the debts to be paid out of the future earnings or after-acquired property of the bankrupt in such manner and subject to such conditions as the Court may direct; but execution shall not be issued on the judgment without leave of the Court, which leave may be given on proof that the bankrupt has since his discharge acquired property or income available towards payment of his debts.

"Provided, that if at any time after the expiration of two years from the date of any order made under this section the bankrupt shall satisfy the Court that there is no reasonable probability of his being in a position to comply with the terms of such order, the Court may modify the terms of the order, or of any substituted order, in such manner and upon such conditions as it may think fit.

"(3.) The facts hereinbefore referred to are:—

"(*a*) That the bankrupt's assets are not of a value equal to ten shillings in the pound on the amount of his unsecured liabilities, unless he satisfies the Court that the fact that the assets are not of a value equal to ten shillings in the pound on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible;"

C. A. 1904

GASKELL, *In re.*

Vaughan Williams L.J.

bankrupt can dictate to the Court that the only order to be made is simply to suspend his discharge for two years. The Court might make a very different order. It might suspend his discharge until he paid a dividend of 10*s.* in the pound to the creditors. Under these circumstances my doubt was whether we ought to send this case back to the learned registrar to make such other order as he might think right, or whether we ought to deal with the matter ourselves. I think that we ought to deal with the matter ourselves unless we have reason to suppose that the bankrupt had been guilty of such misconduct as to lead us to the conclusion that an order suspending his discharge for two years would be too lenient an order. But the official receiver being asked whether he knew of any such conduct on the part of the bankrupt beyond the fact to which our attention has been called, says that there are no further facts within his knowledge. In that state of things I do not doubt that an order suspending the discharge of this bankrupt for two years will be a sufficient order, having regard to the terms of s. 8, sub-s. 2, of the Bankruptcy Act, 1890. After all, the overriding intention of the Legislature in all Bankruptcy Acts is that the debtor on giving up the whole of his property shall be a free man again, able to earn his livelihood, and having the ordinary inducements to industry. Sometimes it is not right that the bankrupt should be free immediately; he must pass through a period of probation; and theoretically there may be cases in which he ought not to be free at all, but primâ facie he is to give up everything he has, and on doing that he is to be made a free man. Now what is the position of the bankrupt in this case? If I thought that there was any tangible expectation of his receiving a larger income than that which is necessary for his support in his position of life as an officer in the army, then I should see the propriety of suspending his discharge for a longer period, or even of setting aside some portion of his income. I see no reason to suppose that a suspension of his discharge for two years will not meet the justice of the case. The time from which the two years will begin to run must be February 25,

the date when the application of the official receiver was disposed of.

C. A. 1904

GASKELL, *In re.*

STIRLING and COZENS-HARDY L.JJ. concurred.

Appeal allowed

Solicitors: *Redpath, Marshall & Holdsworth; J. E. Lickfold.*

H. B. H.

[IN THE COURT OF APPEAL.]

C. A. 1904 *Feb.* 29; *April* 29.

In re ROWE. *Ex parte* DERENBURG & CO.

Bankruptcy—Proof—Loan on Forged Security—Voluntary Payment by Third Party to Creditor for the Loss sustained—Creditor's Right to prove for the Whole Debt.

At the date of his bankruptcy A. owed B. some 16,500*l.* for moneys advanced to him by B. on the deposit of a transfer of shares which turned out to be a forgery. Subsequently C., who was formerly A.'s partner, whilst repudiating all liability for A.'s fraud, voluntarily paid B. 6500*l.* for the loss thereby sustained. This payment was made without A.'s knowledge:—

Held, affirming Buckley J., that the payment was not made on account of either the debt or the debtor, and that B. could prove for the full amount of the debt without deducting the 6500*l.*

APPEAL by a creditor against the rejection of his proof by the trustee.

The debtor, A. S. Rowe, was a member of the firm of Bewick, Moreing & Co., mining engineers, and he was also the secretary to a company. For some years prior to his bankruptcy he had large transactions on the Stock Exchange with Messrs. Derenburg & Co., stockbrokers. On December 27, 1902, he absconded, and on January 19, 1903, a receiving order was made against him, and adjudication followed. At the date of the receiving order he owed Derenburg & Co. 3919*l.* 9*s.* on his speculative account with them; and he also owed them 16,448*l.* 13*s.* 10*d.* for principal and interest on a loan account secured by a certified transfer of shares in the company, which transfer turned

†

C. A. 1904

ROWE, *In re.* DERENBURG & Co., *Ex parte.*

out to be a forgery. Derenburg & Co. were insured against forgery in the sum of 10,000*l.* with an insurance company. Communications passed between Bewick, Moreing & Co. and Derenburg & Co. in reference to the moneys due to the latter from the debtor, and Bewick, Moreing & Co. repudiated any liability, either legal or moral, for the acts of the debtor. Subsequently, on June 3, 1903, Bewick, Moreing & Co. made Derenburg & Co. a voluntary payment of 6500*l.*, which was accompanied by the following letter:—

"Messrs. Derenburg & Co.

"Dear Sirs,—We have now given careful consideration to the matter of your losses in connection with A. S. Rowe, and, although you have admitted that we are not liable in any way in the matter to you, we have pleasure in sending you a cheque for 6500*l.* This we understand will pay all the losses you have sustained, except those for which you hold an insurance policy.

"Yours faithfully,

"Bewick, Moreing & Co."

Derenburg & Co. by a letter of June 4 accepted the money on this footing. The 6500*l.* with the 10,000*l.* insurance was supposed to cover the 16,448*l.* 13*s.* 10*d.* due to Derenburg & Co. from the debtor on his loan account.

On July 3 Derenburg & Co. lodged a proof against the debtor's estate for 13,868*l.* 2*s.* 10*d.*, which was made up by the 3919*l.* 9*s.* and a sum of 9948*l.* 13*s.* 10*d.*, being the balance of the loan account after giving credit for the 6500*l.* received from Bewick, Moreing & Co. Subsequently Derenburg & Co. were advised that, notwithstanding the voluntary payment to them of the 6500*l.* by Bewick, Moreing & Co., they were entitled to prove for the full amount due to them from the debtor; and thereupon on November 5 they lodged a fresh proof in substitution for their first proof, and in their fresh proof they claimed to prove for 20,368*l.* 2*s.* 10*d.* without giving credit for the 6500*l.* The trustee rejected the substituted proof on the ground that Derenburg & Co. had not given credit in it for the 6500*l.* received from Bewick, Moreing & Co. Derenburg & Co. appealed.

Reed, K.C., and *F. C. Willis*, for Derenburg & Co. The question turns on the two letters. Payment by a third party is not payment by the bankrupt, unless it is made at the request and on behalf of the bankrupt, or is subsequently ratified by him: *Kemp* v. *Balls* (1); *James* v. *Isaacs* (2); *Jones* v. *Broadhurst* (3); *Belshaw* v. *Bush* (4); *Lucas* v. *Wilkinson* (5); Leake on Contracts, 4th ed. p. 647. Therefore the whole debt remains. This is a payment by a stranger, not professing to act for the debtor, and saying "This is a payment for the loss you have sustained," and does not prevent the creditor from proving for the whole debt.

Muir Mackenzie, for the trustee. The creditors really accepted this money on account of their debt. This is shewn by their first proof, in which they give credit for the 6500*l.* Although Bewick, Moreing & Co. repudiated all legal liability, the 6500*l.* was really paid on account of the debt. Payment "on account of the loss sustained" on the loan account of the debtor is only another way of stating the indebtedness of the bankrupt. It was not a mere present, but was really money provided by a stranger for the debt, and was intended to cover the balance between the 16,500*l.* and the insurance money.

BUCKLEY J. In my judgment this application must succeed. The applicants on July 3, 1903, carried in a certain proof, the amount of which was 13,868*l.* 2*s.* 10*d.*, and it was arrived at by deducting a sum of 6500*l.*, stated to be cash received on June 4, 1903, from a firm of Messrs. Bewick, Moreing & Co., in which firm the debtor was a partner. On November 5, 1903, the applicants sent in an amended proof, and the amendment consisted in no longer deducting the 6500*l.* which had been deducted in the proof of July. I have to consider whether the proof of November 5 is rightly made—that is to say, whether the 6500*l.* ought to have been deducted or not. Upon that the facts stand thus: On June 3 and 4, 1903, there passed between the firm of Bewick, Moreing & Co. and Derenburg

(1) (1854) 10 Ex. 607.
(2) (1852) 12 C. B. 791.
(3) (1850) 9 C. B. 173.
(4) (1851) 11 C. B. 191.
(5) (1856) 1 H. & N. 420.

C. A. 1904

ROWE, *In re.* DERENBURG & Co., *Ex parte.*

Buckley J.

& Co., the applicants before me, two letters, which shew in my judgment the circumstances under which this 6500*l.* was paid. As between Derenburg & Co. and Bewick, Moreing & Co. the situation was accepted as being—whether it was or not in my opinion is immaterial—that Bewick, Moreing & Co. were not liable for the debt, and under those circumstances they offered to pay, and did pay, Derenburg & Co. a sum of money, not on account of the debt, but in consideration of the losses which Derenburg & Co. had sustained by having been unfortunate enough to deal with the debtor, who was a partner in that firm of Bewick, Moreing & Co. [The learned judge read the letters, and continued :—]

Under these circumstances it seems to me that the point of law which was the subject of decision in *Belshaw* v. *Bush* (1) and several other cases which have been cited does not arise. This is not a case in which a stranger comes and offers to the creditor a portion of the debt due, and the creditor accepts it towards satisfaction of the amount due, there being no communication with the debtor in the matter. It was not tendered or accepted in reference to any part of the debt at all, but it was offered and accepted as a voluntary payment made in consideration of the fact that the creditor had incurred losses through the act of a person for whom Bewick, Moreing & Co. held themselves to be on some moral ground, at any rate not upon any legal ground, responsible. It is simply a voluntary payment made, not on account of the debt, but in consideration of the fact that the debt is going to be a loss because the debtor's estate will not pay 20*s.* in the pound. Under these circumstances I think the creditors are entitled to prove for the full amount of their debt.

H. L. F.

The trustee appealed.

Gore-Browne, *K.C.*, and *Francke* (*Muir Mackenzie* with them), for the trustee. The proper inference from the facts is that this was a payment on account of the debt, and a payment by a stranger on account of a debt is satisfaction of the debt,

(1) 11 C. B. 191.

at any rate if the payment is adopted by the debtor: *Belshaw* v. *Bush* (1); *Kemp* v. *Balls*. (2)

[VAUGHAN WILLIAMS L.J. The best statement of the law in your favour is in *Cook* v. *Lister*. (3)]

That shews that even if the assent of the debtor is necessary (which Willes J. disputes), inasmuch as the payment is for the benefit of the debtor, his assent ought to be assumed. It would not be in accordance with natural justice that the creditor should be paid twice over.

[VAUGHAN WILLIAMS L.J. In Leake on Contracts, 4th ed. p. 647, it is said: "A payment by a third party without any actual or professed authority has been held to be inoperative to discharge the debtor." That implies that the payment must purport to be made on behalf of the debtor.]

If a stranger pays a debt without authority, and before any ratification by the debtor the creditor and the stranger come together and arrange that the money shall be repaid, then, no doubt, the creditor can sue: *Walter* v. *James* (4); but that does not affect this case.

[STIRLING L.J. *Keighley, Maxsted & Co.* v. *Durant* (5) shews that no ratification is possible unless the payment professes to be made on behalf of the debtor.]

Looking at the surrounding circumstances, the proper inference is that Bewick, Moreing & Co., in paying this money in respect of the debt, did purport to pay it on behalf of the debtor.

[VAUGHAN WILLIAMS L.J. Willes J.'s dictum in *Cook* v. *Lister* (6) is inconsistent with *Simpson* v. *Eggington* (7) and *Jones* v. *Broadhurst* (8); and although it was pressed upon the Court in the argument in *Walter* v. *James* (4), neither Kelly C.B. nor Martin B. assented to it.]

It was not necessary to the decision of that case that they should express any opinion upon it.

Reed, K.C., and *F. C. Willis*, for Derenburg & Co.

(1) 11 C. B. 191, 206–7.
(2) 10 Ex. 607, 610.
(3) (1863) 13 C. B. (N.S.) 543, 594.
(4) (1871) L. R. 6 Ex. 124.
(5) [1901] A. C. 240.
(6) 13 C. B. (N.S.) 594.
(7) (1855) 10 C. B. 845.
(8) 9 C. B. 173.

C. A. 1904

ROWE, *In re.* DERENBURG & Co., *Ex parte.*

VAUGHAN WILLIAMS L.J. I think that the judgment of Buckley J. is perfectly right. He finds what are the facts of the case, and says, I think quite justly, that taking the view of the facts which he takes no question arises here as to the soundness of the dictum of Willes J. in *Cook* v. *Lister* (1), nor any such point of law as was raised in *Belshaw* v. *Bush*. (2) The words in which Buckley J. finds the facts are these: "This is not a case in which a stranger comes and offers to the creditor a portion of the debt due, and the creditor accepts it towards satisfaction of the amount due, there being no communication with the debtor in the matter. It was not tendered or accepted in reference to any part of the debt at all, but it was offered and accepted as a voluntary payment made in consideration of the fact that the creditor had incurred losses through the act of a person for whom Bewick, Moreing & Co. held themselves to be on some moral ground, at any rate not upon any legal ground, responsible." I think that that conclusion of fact was perfectly right. This, as Buckley J. points out, was a payment with which Rowe, the debtor, had nothing to do and of which he was quite ignorant. It did not purport to be made on his behalf. It did not purport to be made on account of either the debt or the debtor. It was a voluntary gift made by Bewick, Moreing & Co. for the purpose of mitigating a loss for which they were not liable. I do not think that the parties to this transaction intended, the one the payment to be made, the other the payment to be accepted, for or on account of the debtor or of the debt.

STIRLING L.J. I agree.

COZENS-HARDY L.J. I agree. I think the point of law upon which the appellant relied does not arise in the view which I take of the facts.

Appeal dismissed.

Solicitors for Derenburg & Co.: *C. W. Dunn*, in the Court of first instance; *R. F. Yeo*, in the Court of Appeal.

Solicitors for trustee: *Morley, Shirreff & Co.*

(1) 13 C. B. (N.S.) 543, 594. (2) 11 C. B. 191.

H. B. H.

In re ROWE.
Ex parte WEST COAST GOLD FIELDS, LIMITED.

1904
June 6.

Bankruptcy—Company—Bankrupt Shareholder—Unpaid Shares—Fully Paid Shares—Articles of Company—Company's Lien on Unpaid Shares—Proof on Unpaid Shares—Subsequent Alteration of Articles—Lien on Fully Paid Shares—Amendment of Proof—Inadvertence—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 50—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *Sched. I., r.* 10; *Sched. II., rr.* 13, 14.

One of the articles of a limited liability company provided that the company should have a paramount lien on all the shares not fully paid of any member for all the debts and liabilities due from such member to the company. A member of the company who held partly paid-up shares and also fully paid-up shares became bankrupt. The company proved in his bankruptcy for the amount due to them on his partly paid-up shares without claiming any lien under the article, and their proof was admitted. Subsequently the company, under s. 50 of the Companies Act, 1862, passed a resolution altering the article by omitting the words "not fully paid up," such alteration having a retrospective effect, and giving them a lien on the fully paid shares: see *Allen* v. *Gold Reefs of West Africa, Ld.*, [1900] 1 Ch. 656. The company afterwards went into liquidation, and it appeared that there would be surplus assets to distribute on the fully paid-up shares. The liquidator applied in the bankruptcy that the company might be at liberty to amend their proof, or to withdraw it and lodge a fresh one, and set up their lien on the fully paid-up shares:—

Held, that they were not entitled to do so, for that it was not a case of inadvertence.

THIS was an application by the above-mentioned company that they might be at liberty to amend their proof by inserting and valuing certain securities against the debtor's estate, or alternatively to withdraw the proof and lodge a fresh one, under these circumstances.

On January 19, 1903, a receiving order was made against the debtor, and adjudication followed. At the date of the receiving order the debtor was the registered holder of 1800 partly paid-up shares of 1*l.* each and 3500 fully paid-up shares of 1*l.* each in the West Coast Gold Fields, Limited. The company had been registered on February 4, 1901, with memorandum and articles of association, and the twenty-first article provided that the company should have a first and paramount

1904

ROWE, *In re.* WEST COAST GOLD FIELDS, LIMITED, *Ex parte.*

lien on all shares not fully paid up for all moneys due to (including calls made, even though the time appointed for their payment might not have arrived) and liabilities subsisting with the company from or on the part of any registered holder. On January 8, 1903, the company made a call of 1*s.* per share on the 1800 shares, and on January 26, 1903, they lodged a proof against the debtor's estate for 900*l.* in respect of the same shares, being, as to 90*l.* in respect of the call, and as to 810*l.* in respect of the amount uncalled on the shares. This proof was rejected by the trustee, and on appeal to the judge it was directed to be admitted for 819*l.* At the time this proof was made the company had under art. 21 a lien on the 1800 partly paid-up shares, which they did not value in their proof, but no lien existed in respect of the fully paid-up shares. In January, 1904, the trustee declared a dividend of 1*s.* 6*d.* in the pound, which was received by the company on their admitted proof.

On February 20, 1904, the company in general meeting, under s. 50 of the Companies Act, 1862, passed a resolution that art. 21 should be altered by omitting the words "not fully paid up," and this resolution was duly confirmed at a general meeting of the company held on March 2. The trustee did not attend these meetings nor vote on the resolution. This alteration of the article was intended to meet the case of the debtor and certain other shareholders of the company, and was also made with a view to the voluntary winding-up of the company. In April the company went into voluntary liquidation, and the liquidator on behalf of the company now applied that the company might amend their proof, or alternatively might withdraw it and lodge a fresh one, and set up as secured creditors the lien on the 3500 fully paid shares which, under art. 21 as altered, they had in respect of the amount due on the 1800 partly paid shares.

It appeared that on the winding-up of the company there would be, after satisfying all the debts and liabilities of the company, surplus assets to distribute amongst the shareholders estimated at about 3*s.* per share on the fully paid shares. It also appeared that the debtor's estate would not realize more than another 1*s.* 6*d.* in the pound.

Reed, K.C., and *Tyndale Davis*, for the application. Under art. 21 the company had a lien on all shares not fully paid up, which was of little value. But by s. 50 of the Companies Act, 1862, the company had power to alter art. 21 and extend their lien to fully paid-up shares; such an alteration has a retrospective effect, and a shareholder takes his shares subject to the original articles and the power of altering them given to the company by statute: *Allen* v. *Gold Reefs of West Africa, Ld.* (1) Therefore the bankrupt was bound by the possibility of such a lien coming into existence, and his trustee has no higher or better right against the company than the bankrupt. In cases of mistake or inadvertence a creditor is entitled under rules 13 and 14 of Sched. II. of the Bankruptcy Act to amend or withdraw his proof. This is a security which the company have acquired since their proof was made,—which they had a right to acquire, and which could not be valued at the time they made their proof. Unless they are allowed to amend, they will under rule 10 of Sched. I. be deemed to have surrendered their security, and will have to pay the trustee about 350*l.* on the fully paid shares, while they will only receive about 120*l.* on their proof. This would be manifestly inequitable.

P. Francke, for the trustee. By proving for their whole debt the company abandoned their lien, and their debt must be taken to be satisfied: *Stammers* v. *Elliott.* (2) Further, a creditor who proves for the whole of his debt without mentioning his security is not allowed to amend unless the Court is satisfied that the omission to value the security was due to "inadvertence": Sched. I., r. 10; *In re Safety Explosives, Ld.* (3); *Ex parte Clarke.* (4) Here it cannot be said that there was inadvertence, and therefore no case is made out for amendment.

[He was stopped.]

Reed, K.C., in reply. There has been no election by the company to abandon any lien they might acquire by altering the article. No doubt they might, when proving, have referred to the possible alteration of the article, but they could not

(1) [1900] 1 Ch. 656.
(2) (1868) L. R. 3 Ch. 195.
(3) [1904] 1 Ch. 226.
(4) (1892) 67 L. T. 232.

1904

ROWE, *In re.* WEST COAST GOLD FIELDS, LIMITED, *Ex parte.*

have set it up as a security except on the footing of a lien that might possibly arise. It would have been impossible for them to deal with or value such a security at that time on any satisfactory basis. No one will be injured here by allowing this amendment, and the company will, of course, refund the dividend they have received. *In re Rhoades* (1) and *In re Mateo Clark* (2) are instances where amendments have been allowed.

BIGHAM J. I am not disposed to allow this amendment. At the time they made their proof the company knew, or must be taken to have known, that there was the possibility of acquiring this security by art. 21 being altered by such a resolution as they subsequently passed; and if they had wished to claim that security and to value it, they ought to have mentioned it in their proof. It may be that they might have valued it inaccurately. If they had valued it inaccurately, they could afterwards have applied for leave to amend. If they had passed their resolution first, and then made their proof and set up their security and valued it inaccurately, probably in that case also they might have amended their valuation. I have come to the conclusion that they elected to omit all reference to this security, and they have by their own act altered the position of matters. In my opinion it is not a case of inadvertence, and this application must be dismissed with costs.

Solicitors: *R. F. Yeo; Morley, Shirreff & Co.*

(1) [1899] 2 Q. B. 347. (2) [1901] 1 K. B. 655.

H. L. F.

1904
June 6.

In re C. GREAVES.
In re W. H. GREAVES.
Ex parte THE OFFICIAL RECEIVER.

Bankruptcy—Practice—Partnership—Deceased Insolvent Partner—Order for Administration in Bankruptcy—Bankruptcy of Surviving Partner—Consolidation of Proceedings—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 106, 108, 112, 125.

When a member of a partnership dies insolvent and an order is made under s. 125 of the Bankruptcy Act, 1883, for the administration of his estate in bankruptcy, and afterwards the surviving partner becomes bankrupt, the Court has jurisdiction to direct the proceedings in the two estates to be consolidated.

THIS was an ex parte application for the consolidation of proceedings under these circumstances.

W. H. and C. Greaves carried on business in partnership as stockbrokers. In February, 1904, W. H. Greaves died insolvent, and letters of administration to his estate with his will annexed were granted to his mother, who was one of his creditors. On April 22 an order was made by the Bankruptcy Court, on a creditor's petition under s. 125 of the Act, for the administration in bankruptcy of the estate of W. H. Greaves, and the official receiver became the trustee. In the meantime, on March 11 a receiving order was made against C. Greaves, the surviving partner, and adjudication followed, and a Mr. Costello became the trustee in his bankruptcy. The official receiver then applied to the Court for an order that the proceedings in the two estates might be consolidated. It was admitted that there was no specific power in s. 125 to make the order and that the application was novel, and thereupon the registrar referred the matter to the judge. The assets of C. Greaves were small, and the estate of W. H. Greaves was sworn at about 2500*l.* There were large claims against the partnership.

Muir Mackenzie, for the application. There is no case in which such an order has been made, although the facts in

1904

C. GREAVES, *In re.* W. H. GREAVES, *In re.* OFFICIAL RECEIVER, *Ex parte.*

New, Prance & Garrard's Trustee v. *Hunting* (1) were very similar, and it appears that the proceedings there were carried on by the same person being appointed the trustee of the two estates. It is submitted that, reading ss. 106, 108, and 112 with sub-ss. 1, 2, 5, and 6 of s. 125 of the Act, the Court has power to make the order, so that there can be one trustee both of the joint estates and of the separate estates.

BIGHAM J. The application is a reasonable one, and the only question is whether I have power to make the order. I think that s. 125, taken in conjunction with ss. 106, 108, and 112, justifies me in making an order for the consolidation of the proceedings under these two estates. It is obviously for the benefit of all parties, and will be a saving of expense, if the two estates are consolidated. I therefore make the order that is asked for, and Mr. Costello can be the trustee in the consolidated proceedings.

Solicitor: *George Tilling.*

(1) [1897] 1 Q. B. 607.

H. L. F.

[IN THE COURT OF APPEAL.]

C. A.
1904
June 7, 23;
July 5.

LOGAN *v.* BANK OF SCOTLAND AND OTHERS.

Practice—Service of Writ of Summons—Scottish Corporation carrying on Business in England — "Statutory Provision regulating Service of Process"—Order IX., *r.* 8.

Order IX., r. 8, provides for the service of writs of summons on corporations "in the absence of any statutory provision regulating service of process."

The writ of summons in an action against the Bank of Scotland, upon a cause of action which apparently arose in Scotland, was served upon the manager of a branch of the defendant bank at the office of that branch in the City of London in accordance with Order IX., r. 8. The defendant bank was constituted under statutes which contained no provision for the service of process upon the bank. The Citation Amendment (Scotland) Act, 1882, relates exclusively to process issued from Courts in Scotland, and contains no provision applicable to the service of process issuing from an English Court:—

Held, that the service effected upon the defendant bank as above mentioned was valid under Order IX., r. 8.

APPEAL from an order made by Bruce J. at chambers, affirming an order of a master, setting aside service of the writ of summons in an action against the Bank of Scotland, James Scott, Robert Young, and George Anderson.

The writ had been served upon the manager of a branch of the defendant bank at the office of that branch in Bishopsgate Street in the City of London. The defendants, the Bank of Scotland, had entered a provisional appearance.

The defendants Young and Anderson had not yet been served.

The facts sufficiently appear from the judgment.

James Dunbar and *Eric Dunbar*, for the plaintiff. The service in this case was valid under Order IX., r. 8. The Bank of Scotland has a branch office at which it carries on business in London, and it has been held in many cases that service of a writ in an action may be effected under Order IX., r. 8, on a foreign corporation which is resident within the jurisdiction by

C. A. 1904

LOGAN v. BANK OF SCOTLAND.

reason of its carrying on business in England: see *Newby* v. *Von Oppen* (1); *Lhoneux, Limon & Co.* v. *Hong Kong and Shanghai Banking Corporation* (2); *Haggin* v. *Comptoir d'Escompte de Paris* (3); *La Bourgogne*. (4) In *Watkins* v. *Scottish Imperial Insurance Co.* (5) the ground of the decision was that by the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 62, statutory provision was made for service on companies which are registered under that Act generally. There is no such statutory provision for service on the defendant bank.

Rufus Isaacs, K.C., and *Bremner, S. C. Agnew* with them, for the defendants, the Bank of Scotland. There is no case in which it has been held that a Scottish corporation can be served with a writ of summons in England where it carries on business in that country. The cases cited for the plaintiff are all cases of foreign corporations, which it was held might be resident in England, though also resident abroad. The provisions of Order IX., r. 8, only apply "in the absence of any statutory provision regulating service of process." There is no question here of service out of the jurisdiction. The question is whether the defendants, who are a corporation domiciled in Scotland, can be served within the jurisdiction; and by the express terms of rule 8 it does not apply, if there is another statutory mode of service on the defendants. It is contended that the Citation Amendment (Scotland) Act, 1882 (45 & 46 Vict. c. 77), which by s. 3 provides for service of a citation on a "person" in Scotland by registered letter, is a statutory provision which prevents rule 8 from being applicable. By s. 7 of that Act the word "person" includes a corporation.

[COLLINS M.R. That Act apparently only applies to service of process in Scotland. The question is whether "statutory provision regulating service of process" in rule 8 does not mean "statutory provision for service in this country."]

It is submitted that the operation of the Act is in effect to provide that a person or body domiciled in Scotland may be sued in Scotland in the manner therein specified, and, that

(1) (1872) L. R. 7 Q. B. 293.
(2) (1886) 33 Ch. D. 446.
(3) (1889) 23 Q. B. D. 519.
(4) [1899] P. 1; [1899] A. C. 431.
(5) (1889) 23 Q. B. D. 285.

being so, that Order IX., r. 8, does not apply. In *Palmer* v. *Caledonian Ry. Co.* (1) Fry L.J. said with regard to the meaning of the words "statutory provision regulating service of process" in rule 8: "I read that to mean any provision of a statute passed by the Imperial Parliament, whether it relates to service in this country or any other place which is subject to the Imperial Parliament." Secondly, it is contended that the Bank of Scotland does not, for the present purpose, reside within the jurisdiction within the meaning of the decisions which have held that a foreign corporation may reside in England by carrying on business here. The cause of action in this case arose entirely in Scotland, and the plaintiff and all the defendants but one are domiciled there. A foreign corporation may be said to be resident in England as regards business which it carries on at a place of business occupied by it here, but the mere fact that it has a place of business in this country does not, it is submitted, make it liable to the process of an English Court in a case where the cause of action arose and the parties reside out of England. The policy of the Legislature has always been against giving the English Courts jurisdiction in matters arising within the jurisdiction of the Scottish and Irish Courts between parties domiciled in Scotland and Ireland: see Order XI., rr. 1*e*, 2.

[They also cited *Dunlop Pneumatic Tyre Co.* v. *Actien-Gesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co.* (2); *Jones* v. *Scottish Accident Insurance Co.* (3)]

Cur. adv. vult.

July 5. The written judgment of the Court (Collins M.R. and Stirling L.J.) was read by

STIRLING L.J. This is an appeal by the plaintiff from an order of Bruce J., made in chambers, affirming an order of the master setting aside the service of the writ on the defendant bank. The writ is by James Bowie Logan (described as

(1) [1892] 1 Q. B. 823. (2) [1902] 1 K. B. 342.
(3) (1886) 17 Q. B. D. 421.

C. A. 1904

LOGAN v. BANK OF SCOTLAND.

Stirling L.J.

residing at Inveraray in the county of Argyll) against the bank (described as of Bishopsgate Street in the City of London), James Scott (described as of 36, Great Tower Street in the City of London), Robert Young and George Anderson (both described as of Edinburgh), and claims damages for fraudulent conversion, and misrepresentation in floating a firm of James Young & Son into a limited liability company, and for fraudulent misrepresentation alleged to be contained in a prospectus of James Young & Sons, Limited, issued by the defendants. The writ was served on May 2, 1904, on the manager in London of the London branch of the Bank of Scotland at 19, Bishopsgate Street, where the defendants have a large office with the name "Bank of Scotland" displayed on brass plates on the outside and at the entrance, and where they carry on the business of bankers with a large staff. The bank was incorporated in 1695 by an Act of the Parliament of Scotland, which is stated to have been recognised and confirmed by various Acts of the Imperial Parliament. None of these Acts contain any provision as to service of process on the bank. The principal office is at Edinburgh, and there all the board meetings are held.

The cases of *Newby* v. *Von Oppen* (1), *Haggin* v. *Comptoir d'Escompte de Paris* (2), and *La Bourgogne* (3) shew that a foreign corporation which carries on business in England may be sued here, and that the writ may be served on the proper officer of the corporation here in accordance with Order IX., r. 8.

For the purposes of this rule a Scottish corporation is a foreign corporation; but it is contended that there exists, in the language of the rule, "statutory provision regulating service of process," in accordance with which service ought to have been made at the head office of the bank. Undoubtedly such statutory provision exists in some cases, as, for example, in the case of railway companies into whose constitution the provisions of the Companies Clauses Act, 1845, have been incorporated: see *Palmer* v. *Caledonian Ry. Co.* (4); and also in the case of companies formed under the Companies Act,

(1) L. R. 7 Q. B. 293.
(2) 23 Q. B. D. 519.
(3) [1899] P. 1; [1899] A. C. 431.
(4) [1892] 1 Q. B. 823.

1862: see *Watkins* v. *Scottish Imperial Insurance Co.* (1) In both these cases the statutes provided for service at the head office of the company, and it was held that service at a branch office within the jurisdiction was irregular, the proper course being to obtain leave to serve the writ at the head office out of the jurisdiction under Order XI. No such statute applicable to banking companies has been brought to our notice. The statute relied on was 45 & 46 Vict. c. 77, intituled "An Act to amend the law of citation in Scotland"; but, when that Act is examined, and read in connection with the Citation Amendment (Scotland) Act (34 & 35 Vict. c. 42), referred to in the preamble, it is found to relate exclusively to process issued from the Courts of Scotland, and to contain no provision applicable to the service of process issuing from an English Court. It seems to us that this Act does not constitute a statutory provision regulating the service of process within the meaning of the rule.

It was also said that the right to serve a foreign corporation carrying on business in England exists only when the cause of action has arisen in England, and therefore does not exist in the present case, inasmuch as the cause of action arose in Scotland. It is difficult to see why this should be so. If a foreigner is found within the jurisdiction, he may be served with a writ, although the cause of action did not arise in England; and it is not easy to see why there should be a difference as to the right to serve a foreign corporation which is found to have a place of business, and to be trading in this country, and which is therefore to be treated as resident here. Further, the decided cases do not support this contention. In *Haggin* v. *Comptoir d'Escompte de Paris* (2) the action was brought on a contract made in Paris, and in *La Bourgogne* (3) the cause of action was a collision on the high seas.

Lastly, it was said to be contrary to the policy of the law that actions of this kind should be brought in England, when they might be brought in the Scottish Courts within whose jurisdiction the defendants' bank has its head office, and the

(1) 23 Q. B. D. 285. (2) 23 Q. B. D. 519.
(3) [1899] P. 1; [1899] A. C. 431.

C. A. 1904

LOGAN v. BANK OF SCOTLAND.

Stirling L.J.

defendants Young and Anderson as well as the plaintiff reside. In support of this contention reference was made to Order XI., r. 2. This rule relates to service out of the jurisdiction, and must receive careful attention when any application for that purpose is made to the Court, as, for example, if leave should be sought to serve the defendants Young and Anderson out of the jurisdiction. No such rule applies where service is made within the jurisdiction. If the defendants Young and Anderson were found within the jurisdiction, the plaintiff would be entitled to serve them with the writ as of right, and without any leave obtained from the Court; and, in the circumstances of this case, the plaintiff also, in our opinion, is entitled to serve the defendant bank as of right, and without leave.

We therefore think that the appeal ought to be allowed, and that the orders made by the master and the judge should be discharged.

Appeal allowed.

Solicitor for plaintiff: *D. W. Drummond.*

Solicitors for defendants: *Ashurst, Morris, Crisp & Co.*

E. L.

PARKER *v.* LONDON COUNTY COUNCIL.

1904
Feb. 22.

Public Authorities' Protection—Limitation of Action—Public Authorities Protection Act, 1893 (56 & 57 *Vict.* c. 61), s. 1.

The protection given by the Public Authorities Protection Act, 1893, extends to a county council or other public authority in their capacity as owners of a tramway acquired and worked by them under statutory powers, and an action to recover damages for injuries sustained by a passenger on one of their tramcars in consequence of the alleged negligence of their servants must therefore be commenced within six months of the act, neglect, or default complained of.

The Ydun, [1899] P. 236, followed.

Point of law raised by the pleadings and set down for argument before the trial of the action, pursuant to Order xxv., r. 2.

The action was brought by an infant plaintiff and his mother to recover damages for injuries alleged to have been caused by the negligence of the servants of the defendants. The defendants were the owners of a tramway, formerly the property of the London Tramway Company, which had been acquired and was being worked by them under the powers conferred by the London Tramways Company (Limited) Act, 1896 (59 & 60 Vict. c. clxxxix.), and the London County Tramways Act, 1896 (59 & 60 Vict. c. li.); the defendants worked the tramway with their own servants and plant, the funds for the working being provided out of the rates. On June 16, 1902, the plaintiffs, while travelling as passengers on the top of one of the defendants' tramcars, were injured by a collision which took place between it and another of the defendants' tramcars, and which was alleged to have been due to the negligence of the driver of one or both of the tramcars. Correspondence took place regarding the accident and the claim of the plaintiffs against the defendants, and full particulars of the special damage claimed were given to the defendants on November 17, 1902, but the writ in the action was not issued until January 12, 1903, which was more than six months after the date of the accident and of the alleged negligence. The defendants

1904

PARKER v. LONDON COUNTY COUNCIL.

pleaded that they were entitled to the benefit of the Public Authorities Protection Act, 1893, and that, as proceedings had not been commenced within six months after the neglect complained of, s. 1 (*a*) of that Act afforded a defence to the action. (1)

Moyses, for the plaintiffs. The defendants are not entitled to the protection of s. 1 of the Public Authorities Protection Act, 1893; that section applies only to acts "done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority," whereas the plaintiffs complain of negligence in carrying them as passengers on the defendants' tramcars. In their capacity of carriers of passengers the defendants cannot claim the protection of the Act, but, as proprietors of a commercial undertaking, are liable to all the ordinary incidents of the law of negligence. Negligence in their capacity as carriers is something wholly distinct from things done or omitted under the special authority of the Act of Parliament: *Carpue* v. *London, Brighton and South Coast Ry. Co.* (2) The authorization to carry on a particular business which a public body derives from a particular statute does not make all the acts or omissions of its servants in that business acts done or omitted under the Act.

Daldy, for the defendants. In working the tramway the defendants were acting as a public body, for not only did their powers depend upon statutory authority, but the tramways

(1) By 56 & 57 Vict. c. 61 (The Public Authorities Protection Act, 1893), s. 1, "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect: (*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof:"

(2) (1844) 5 Q. B. 747.

were acquired and maintained by them out of the rates, and any liability in respect of them must be met out of the rates. The case is really covered by authority. *Ambler* v. *Bradford Corporation* (1) shews that works done by a municipal corporation acting under the powers conferred upon them by a provisional electric lighting order duly confirmed by statute are done by them in the exercise of a public duty or authority within the meaning of the Act of 1893, and Vaughan Williams L.J. expressly says (2): "The protection of the Act seems plainly to extend to a municipal authority supported primarily by the levy of rates, and which is bound to apply all the earnings of any undertaking authorized by statute in relief of the ratepayers." It must be remembered that s. 2 of the London County Tramways Act, 1896, gave the defendants statutory authority to work the tramway, and therefore in working the tramway the defendants are carrying out a public duty.

[CHANNELL J. Is that more than a common law duty? It is difficult to see how the negligence of a servant can be an act done in the execution of a public authority in the case of the defendants but not in the case of a tramway company, which equally derives its powers to work a tramway from statute.]

That point is really concluded by *The Ydun* (3), where a port and harbour authority, who were sued in respect of the negligent act of their servants in inviting a vessel to come up the river to the docks when there was not sufficient water in the channel leading thereto, were held to be acting in pursuance of their public duties and to be entitled to the benefit of the Act. In *North Metropolitan Tramways Co.* v. *London County Council* (4) the county council were treated as being, in the exercise of their tramway powers, within the protection of the Act as to costs, and that decision involves the decision of the point in the present case. In giving authority to work the tramways, the statute also imposed the duty of working them carefully. [He also cited *Attorney-General* v. *Margate Pier*

(1) [1902] 2 Ch. 585.
(2) [1902] 2 Ch. at p. 593.
(3) [1899] P. 236.
(4) [1898] 2 Ch. 145.

1904

PARKER v. LONDON COUNTY COUNCIL.

Co. (1); *Chamberlain & Hookham* v. *Bradford Corporation* (2); *Markey* v. *Tolworth District Board* (3); *Edwards* v. *St. Mary, Islington* (4); *Smith* v. *Northleach Rural Council.* (5)

Moyses, in reply. *Palmer* v. *Grand Junction Ry. Co.* (6) is an additional authority for the proposition that an act done by a corporation in their capacity of carriers is not an act done under the special authority of their Act of Parliament. The judgment of the Court of Appeal in *The Ydun* (7) does not support the view of Sir F. Jeune P. that the Act applies to municipal trading under the authority of a special Act which trading would in private hands be of a private character; this is pointed out by Vaughan Williams L.J. in *Ambler* v. *Bradford Corporation.* (8)

CHANNELL J. During a considerable portion of the argument I was inclined to think that there were grounds upon which the point raised could properly be decided in favour of the plaintiffs; but I have come to the conclusion that the question is concluded by authority, and that whatever my own personal opinion may be I am bound to give judgment for the defendants. The facts are very few. The London County Council, under the combined operation of certain Acts of Parliament, has obtained power to work certain tramways, and in particular a tramway at Tooting, and the action is brought by a child and its mother, who were passengers upon a tramcar and were injured in a collision with another tramcar, which collision is alleged to have been due to the negligence of the drivers.

The question is whether the action is one to which the protection given by the Public Authorities Protection Act, 1893, applies. The case of *Attorney-General* v. *Margate Pier and Harbour Co.* (9) shews, if it were necessary to shew it, that a tramway company would have no such protection;

(1) [1900] 1 Ch. 749.
(2) (1900) 83 L. T. 518.
(3) [1900] 2 Q. B. 454.
(4) (1889) 22 Q. B. D. 338.
(5) [1902] 1 Ch. 197.
(6) (1839) 4 M. & W. 749; 51 R. R. 805.
(7) [1899] P. 236.
(8) [1902] 2 Ch. at p. 591.
(9) [1900] 1 Ch. 749.

they would be a commercial company carrying on, like a railway company, a business in which no doubt the public is to a certain extent interested, though not to a sufficient extent to bring the tramway company within the category of persons acting in the execution of statutory or other public duties when they are carrying on the business. Here, on the other hand, there is what I may call a municipal body which is carrying on the business, and the general principle in reference to matters which have to be paid for out of the rates is that each body of ratepayers for the time being should bear its own burden, and that they should not borrow money without authority or so as to place an unfair burden on posterity by leaving things done in their own time unpaid for in order that they may be paid for in after years. That is a possible reason for this protection which the Legislature has given to public bodies administering, or supported by, the rates, though there is no indication in the Act itself of the existence of any such reason. I do not, however, base my decision upon any such view; in point of fact I think that the Legislature was not contemplating at all the case of a municipal body carrying on a commercial enterprise. What is the effect of the language which the Legislature has used? The foundation of the action is the alleged negligence of the defendants' servants in the working of the tramway. If I were construing the Act for the first time I should have been inclined, although, bearing in mind the decisions of other judges upon the Act, I should no doubt have been wrong, to say that, although a municipal body might be entitled to the protection of the Act in regard to matters done by them in the course of the construction of a tramway, they would not be entitled to it in regard to matters subsequently arising during its working, and that they would not be brought within the words "neglect or default in the execution of such duty" merely because the act which they were doing would have been ultra vires unless done under statutory authority. There seemed to me to be considerable force in that argument; but among the cases to which I have been referred is that of *The Ydun* (1), which,

(1) [1899] P. 236.

1904

PARKER v. LONDON COUNTY COUNCIL.

Channell J.

though an Admiralty case, cannot be distinguished in principle from the case now before us.

The exact point in *The Ydun* (1) was that the municipal corporation of Preston had become a harbour authority and had acquired statutory power to take tolls, and owing to the negligence of their harbour master damage had been done to a ship. The exact point that I have been considering was argued in that case, and Sir Francis Jeune P. in giving judgment said (2): "I cannot doubt that the corporation of Preston in carrying out under statutory authority its enterprise of the River Ribble Navigation, a water highway to Preston, acts as a public authority executing a public duty as much as when it makes or maintains the land highways within the ambit of the municipality. I think further that the point is covered by authority." Then the learned judge cites *Harrop* v. *Ossett Corporation* (3), *North Metropolitan Tramways Co.* v. *London County Council* (4), and *Fielding* v. *Morley Corporation* (5), as to which he says that they are "instances in which this Act was held to apply to municipal corporations carrying out works outside the scope of strictly municipal duties. An endeavour was made before me to distinguish those decisions on the ground that they apply to the construction of works, and not to the carrying on of a business by contracts with private individuals. But I can see no ground for this distinction. Whether a corporation is constructing a work or using it, whether, for example, it is building an aqueduct and laying pipes from it, or supplying a consumer from the aqueduct by means of the piping, it appears to me to be equally engaged in executing the duties imposed on it by Act of Parliament, and, though it may be asked why a corporation so acting should receive privileged advantages in litigation, I cannot doubt that the Act in question has conferred them." That is the exact point in the present case. The decision went to the Court of Appeal, where the same arguments were employed as in the Court below, the counsel for the plaintiffs repeating their

(1) [1899] P. 236.
(2) [1899] P. at p. 240.
(3) [1898] 1 Ch. 525.
(4) [1898] 2 Ch. 145.
(5) [1899] 1 Ch. 1.

argument to the effect that there was a distinction between the carrying on of works and their construction; but the Court of Appeal decided against them. The learned judges do not in their judgments go fully into that particular distinction, though it must have been present to their minds. They decided, in an Admiralty action to recover damages for the negligence of the harbour-master in admitting the ship into the harbour when there was not sufficient water for her, that that was a matter in which the municipal corporation were entitled to the protection of the statute, and that is a decision on the only point in this case on which I had any real doubt. The authorities cited on behalf of the plaintiffs are rather old, and though upon some points of law the older the authority the better, there are others, such as notice of action, Statute of Limitations, and the performance of their duties by public bodies, in which the law has been considerably altered during the last sixty years, and upon such points the later authorities are more reliable. In *Carpue* v. *London, Brighton and South Coast Ry. Co.* (1) the action was brought against an undoubted trading company, and, according to the more modern decisions, the company would not have been brought within the protection of this Act of Parliament, which was not then in existence. I cannot regard that case as an authority which would justify me in refusing to act on the authority of the Court of Appeal in *The Ydun*. (2) On these grounds I must hold that the defendants are entitled to the protection of this statute.

Judgment for defendants.

Solicitor for plaintiffs: *Henry I. Sydney.*
Solicitor for defendants: *W. A. Blaxland.*

(1) 5 Q. B. 747. (2) [1899] P. 236.

W. J. B.

1903
Dec. 7, 8, 9.
1904
Feb. 12;
May 16.

GREAT WESTERN RAILWAY COMPANY *v.* CASWELL & BOWDEN, LIMITED.

Railway Company—Carriage—Rates—Pitwood—Measurement Weight or Actual Weight—Maximum Charge varying with Distance—Goods carried for part of Journey over another Company's Line—How Maximum Charge for each Part to be calculated—Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 *Vict. c. ccxxii*).

Under the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, the company are not bound to carry pitwood for mining purposes by measurement weight at the rates specified in the schedule thereto as applicable to goods in Class C. If the customer claims the benefit of the Class C rates, the company may charge those rates on the actual machine weight; on the other hand, if the pitwood be consigned at measurement weight, the company are entitled to charge the rates applicable to goods in Class 1.

The maximum rates which under the said Act the company are entitled to charge for the carriage of goods, and which maximum rates vary inversely with the distance carried, apply only to carriage over the company's own lines; and where goods are carried under a through contract with the company from a point on their own line to a point on another company's line, the portion of the journey which is over the foreign company's line is to be treated as a separate journey, in respect of which the company are entitled to charge the maximum rate authorized by the foreign company's Act as applicable to a journey of that distance, irrespective of the distance which the goods may have previously been carried over the company's own line.

TRIAL before Walton J. in the Commercial Court.

The defendants were timber merchants, and the action was brought to recover a balance on freight account for goods (mainly consisting of pitwood for mining purposes) carried for the defendants. By the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, it was provided that the maximum rates and charges which the Great Western Railway Company should be entitled to charge in respect of merchandise traffic on its railway system should be the rates and charges specified in the schedule thereto. By the said schedule the various kinds of merchandise were arranged in classes, and the maximum rates thereby provided

for the conveyance of goods in Class C and Class 1 were per ton per mile as follows:—

	For the first twenty miles or any part of such distance.	For the next thirty miles or any part of such distance.	For the next fifty miles or any part of such distance.	For the remainder of the distance.
	d.	*d.*	*d.*	*d.*
Class C .	1·80	1·50	1·20	0·70
Class 1 .	2·20	1·85	1·40	1·00

Amongst the things in Class C were included "Pitwood for mining purposes," and "Timber, actual machine weight." Amongst the things in Class 1 was included "Timber, measurement weight."

By s. 16 of the schedule, "Weight (except as to stone and timber when charged by measurement) shall be determined according to the imperial avoirdupois weight." By s. 24, "Any railway company (other than the company) conveying merchandise on the railway shall be entitled to charge and make the same rates and charges as the company are by this schedule authorized to make." In the same year 1891 the other principal railway companies obtained similar Rates and Charges Order Confirmation Acts, and in each of those Acts there was a clause in similar terms to those of s. 24 above set out. Among the points in issue between the parties were the following: Whether the plaintiffs were empowered to charge for a consignment of pitwood for mining purposes as timber at measurement weight, or, alternatively, whether the plaintiffs were bound to charge Class C rates upon the tonnage of such a consignment arrived at by measurement weight, or whether they were empowered to charge Class C rates upon the machine weight of the consignment. The actual machine weight of timber is considerably in excess of its measurement weight, so that the cost of its carriage by machine weight at the lower Class C rates is much the same as the cost of its carriage by measurement weight at the higher rates applicable to Class 1.

A further point in issue was whether the plaintiffs were

1904

GREAT WESTERN RAILWAY v. CASWELL & BOWDEN, LIMITED.

empowered for the purpose of ascertaining the mileage rate applicable to apply the scale successively of the different systems of railway over which the traffic passes. For the purpose of illustrating this issue reference was made to a consignment of oak timber to be carried by measurement weight from New Radnor on the Great Western to Leominster on the Shrewsbury and Hereford line, the distance between the two points being twenty-one miles, of which twenty miles were on the Great Western and one mile on the Shrewsbury and Hereford. It was contended for the defendants that the maximum rate chargeable was 2·20*d.* per ton per mile for the first twenty miles, and 1·85*d.* per ton for the last mile, that being the rate allowed by the Great Western Company's Act for the next thirty miles after the first twenty. The plaintiffs claimed to charge for the last mile the maximum rate allowed by the Shrewsbury and Hereford Company's Act for the first twenty miles.

Asquith, K.C., Moon, K.C., and *F. G. Thomas*, for the plaintiffs. "Pitwood for mining purposes" is not treated in the schedule as being timber at all. It is wood, but not timber. That is why it is put in a class by itself. By timber is ordinarily understood wood which is intended to be cut into planks or squared before it is used, whereas pitwood is used in its natural round condition. Then, if pitwood is not timber, it must by virtue of s. 16 be charged at actual avoirdupois weight. If, however, it is to be treated as timber, and is consigned at measurement weight, it must be upon the terms of the consignor paying the Class 1 rates. He cannot have the benefit both of the Class C rates and of the measurement weight.

With regard to the question of the maximum rate in respect of the short distance in the case of through traffic carried on to other railway companies' systems, it is to be observed that the schedule to the Great Western Company's Act specifies the maximum rates to be charged for merchandise traffic on the Great Western system only; it has nothing to do with traffic on any railways outside that system. The charge for the portion

of the journey performed on a foreign company's system must be regulated entirely by that company's Act; and there is no reason why that foreign company should accept, in respect of the carriage over their line for a short distance, less than the maximum allowed by their own Act for a journey of that distance, merely because the goods had already been carried for a long distance over the Great Western line. Conversely, if goods are consigned from a point on a foreign line to a point on the Great Western, the foreign company are entitled by s. 24 of the Great Western Act to charge for the portion of the carriage over the Great Western the maximum rate applicable by that Act to a journey of that distance, irrespective of the distance already carried over the foreign line.

Hugo Young, K.C., and *McCardie*, for the defendants. Pitwood is timber, and it is "timber charged by measurement weight" within s. 16. For if it is not, it must be timber charged by actual weight. And it cannot be that, for if it were it would be already included in "Timber, actual machine weight," in Class C. "Timber, measurement weight," is in general charged the higher rate under Class 1. But pitwood is made an exception to that general rule, because it is a cheaper and commoner class of wood, and it was intended by the Legislature to give it the benefit of a low rate. It would lose the benefit of being put into Class C if its weight were to be taken by machine instead of measurement.

Upon the other point, as to the mileage rate in respect of goods carried off their system, the company are not entitled to treat the portion of the journey on the foreign company's line as a separate journey, and to commence the computation of the maximum rate afresh. The goods are carried under one contract for one entire distance. The traffic is the contracting company's traffic, and it is nothing to the consignor what arrangements may have been made between the contracting company and the foreign company. The foreign line is, for the purpose of through traffic, the line of the contracting company.

Moon, K.C., in reply.

Cur. adv. vult.

1904

GREAT WESTERN RAILWAY v. CASWELL & BOWDEN, LIMITED.

May 16. WALTON J. This is an action brought to recover a balance alleged to be due for the carriage of goods on the plaintiffs' line. A considerable portion of the goods in question consisted of pitwood for mining purposes, and amongst the points in issue submitted for my decision is the question whether the plaintiffs were empowered to charge for consignments of larch pitwood for mining purposes at Class C rates upon the weight arrived at by measurement, or Class C rates upon the machine weight, or Class 1 rates as in respect of timber at measurement weight. It was contended for the defendants that pitwood for mining purposes could properly only be charged under Class C, and that the plaintiffs had improperly charged for it under Class 1. Now with regard to the classification what one finds is this. In Class 1 there is included "Timber, measurement weight." In Class C there is "Timber, actual machine weight." But then there is another item in Class C, "Pitwood for mining purposes." And it is contended for the defendants that because "pitwood for mining purposes" is in Class C, the charge, even when it is consigned at measurement weight, must be made at the rates of Class C and not at those of Class 1. I have to determine whether that contention is sound. By s. 16 of the schedule all goods (except stone and timber when charged by measurement) are to be charged by actual avoirdupois weight. Timber by measurement weight is in Class 1, and that term "timber," I think, is meant to include any kind of timber consigned or carried at measurement weight, including pitwood for mining purposes. The framers of the order seem to have treated the classification of timber, namely, timber by measurement weight, Class 1, and timber by actual weight, Class C, as an exhaustive classification. If the defendants claim to have their pitwood charged as consigned by measurement they must submit to be charged under Class 1. Even if pitwood is to be treated as something different from timber, the defendants are not entitled to have it charged by measurement, but must pay on the actual weight.

Another question which I have to decide is whether, for the purpose of ascertaining the mileage rate applicable, the plaintiffs

are entitled to apply the scale successively of the different railway systems over which the traffic passes. The question was illustrated by reference to the case of a particular parcel of goods carried for the defendants from New Radnor on the plaintiffs' line to Leominster on the Shrewsbury and Hereford line. In the course of that journey the goods were carried twenty miles on the Great Western Company's line and then one mile on the Shrewsbury and Hereford line, and the plaintiffs contend that they are entitled to charge for that mile what the Shrewsbury and Hereford Company would be entitled to charge for a journey of that length and that length only. On the other hand, the defendants say that the rate of charge must be calculated as upon a journey for the whole distance of twenty-one miles. I think it is sufficient for me to say that I have been satisfied by, and that I accept and agree with, Mr. Moon's argument on this point, and I think that for the part of the journey on the Shrewsbury and Hereford line the plaintiffs were entitled to charge as if it were a separate journey beginning when the goods went on to the Shrewsbury and Hereford line.

Judgment for the plaintiffs.

Solicitor for plaintiffs: *R. R. Nelson.*

Solicitors for defendants: *Field, Roscoe & Co., for Pinsent & Co., Birmingham.*

J. F. C.

C. A.
1904
June 25, 27, 28.

[IN THE COURT OF APPEAL.]

GARBUTT, APPELLANT *v.* DURHAM JOINT COMMITTEE, RESPONDENTS.

Police—Pension—"Approved Service"—Continuity of Service—Police Act, 1890 (53 & 54 Vict. c. 45), s. 1.

By s. 1 (*a*) of the Police Act, 1890, a constable in a police force who has completed not less than twenty-five years' approved service is entitled to a pension on retirement. A constable served in the same police force for three periods amounting in the whole to upwards of twenty-five years, between which periods were breaks of about four months and two months respectively, caused in each instance by the resignation of the constable, who was afterwards reinstated in the force:—

Held, by Collins M.R. and Stirling L.J., Mathew L.J. dissenting, that the service contemplated by the before-mentioned section was a continuous service, and that the constable was therefore not entitled to a pension on retirement under that section.

APPEAL against the judgment of a Divisional Court (Lord Alverstone C.J., Lawrance J., and Kennedy J.) upon a case stated by quarter sessions for the county of Durham upon an application by the appellant by way of appeal under s. 11 of the Police Act, 1890, against the refusal of the respondents to order payment of a pension to him under that Act. (1)

At the hearing of the application the appellant relied upon a certificate of approved service for upwards of twenty-five years, which was produced to the Court, and which (save for the following objection to it) was admitted to be a certificate duly given under the Act and to refer to the appellant.

The respondents contended that the certificate, though "sufficient evidence," was not conclusive, and tendered evidence to the effect that the service of the appellant during the period had not in fact been diligent and faithful service, and contended that the certificate related to the period of service and was not conclusive evidence, and that the acting chief constable could not certify as to character, which

(1) Reported [1904] 1 K. B. 522.

appeared from the police records, and that the joint committee were entitled to exercise their discretion as to granting or withholding a pension on the ground of misconduct. The appellant contended that it was not open to the respondents to contest the certificate, and that such evidence was therefore inadmissible. On this point the Court of quarter sessions agreed with the contention of the appellant, and refused to receive evidence as to the appellant's character.

The respondents further contended that upon the true construction of the Act it was necessary that the whole period of service of twenty-five years should be continuous in order to entitle the appellant to a pension in respect thereof. The appellant contended that the period need not be continuous, and further contended that, even so, the certificate of approved service once given precluded the respondents from raising this point. The Court of quarter sessions considered that the Act required that the whole period should be continuous, and, inasmuch as the certificate shewed on its face that there had been two breaks in the period of service, they considered that it was open to the respondents to raise this point. They accordingly dismissed the application of the appellant.

The questions for the opinion of the Court were: (1.) whether the Court of quarter sessions were right in dismissing the application on the ground stated; and (2.) whether they were right in rejecting the evidence tendered on behalf of the respondents.

The certificate signed by the acting chief constable was headed, "Return of service of Police Constable Thomas P. Garbutt, recommended for an ordinary pension." It shewed (inter alia) that he joined the force on September 7, 1876, and resigned on April 30, 1881, a period of 4 years, 236 days; that he was reinstated on August 27, 1881, and was called on to resign on February 9, 1889, a period of 7 years, 167 days; and that he was again reinstated on April 1, 1889, from which date he served until his final retirement for 13 years, 61 days, making a total approved service of 25 years, 99 days; he was placed in the long and faithful service class on March 1, 1897. The certificate went on to certify that "the term of approved

C. A. 1904

GARBUTT v. DURHAM JOINT COMMITTEE.

service entered above has been diligent and faithful service within the meaning of s. 4 of the Police Act, 1890."

The Divisional Court held that the service contemplated by s. 1 (*a*) of the Police Act, 1890, was a continuous service, and therefore the appellant was not entitled to a pension on retirement under that enactment.

Pickersgill and *J. A. Johnston*, for the appellant. By s. 1 (*a*) of the Police Act, 1890, a police constable who has completed not less than twenty-five years' "approved service" is entitled to receive a pension upon retirement. "Approved service" is defined by s. 4, sub-s. 1, to mean such service as may be certified under an order of the police authority to have been diligent and faithful service. There is nothing in s. 1 (*a*) which limits the "approved service" to continuous service. The words "not less than twenty-five years' approved service," in their natural signification, mean service for that length of time whether continuous or not. If the Legislature had intended to limit the service to continuous service, it would have so provided in plain terms. The section does not so provide, but has given a constable an absolute right to a pension after twenty-five years' approved service. The appellant has obtained a certificate of diligent and faithful service as required by s. 4, sub-s. 1, and has served for over twenty-five years. He is therefore entitled to a pension. It is said that other sections in the Act shew that the word "service" in s. 1 (*a*) means continuous service. Sect. 4, sub-s. 5, and s. 5, sub-s. 5, are relied upon for that purpose. Sect. 4, sub-s. 5, provides for the case of a constable belonging to the army reserve, and being called out for training or permanent service, and enacts that, on returning to the police force, he shall be entitled to reckon any approved service which he was entitled to reckon when he was called out. It is suggested that this sub-section would be superfluous, if the service for the purposes of s. 1 need not be continuous. The provision was no doubt inserted ex abundanti cautelâ to meet the case, which may constantly occur, of an army reserve man being in a police force and being called out on military duty. The sub-section is not superfluous,

because it impliedly gives an army reserve man the right of returning to the police force upon the completion of his training or service. The words are, "on returning to the police force," not "if he is allowed to return," and they impliedly give him the right to return. Sub-ss. 1 to 3 of s. 4 also point rather to the construction contended for by the appellant than that contended for by the respondents. Sect. 4, sub-s. 4, was necessary, in order to provide for the case of a police constable shifting from one police force to another. Again, s. 5, sub-s. 5—which deals specially with the mode of reckoning "approved service" for the purposes of a pension, where a constable has retired through incapacity for duty, and has been pensioned, but, on his incapacity ceasing, his pension is cancelled, and he rejoins the police force—is a special provision dealing with a common occurrence, which is inserted in the Act ex abundanti cautelâ. Sect. 4, sub-s. 5, and s. 5, sub-s. 5, cannot control the ordinary and grammatical meaning of the primary enactment in s. 1, giving constables the right to a pension. At the most they may be looked upon as in part superfluous. It would be dangerous and contrary to all sound rules of construction to go minutely through the Act in order to pick out some isolated language in a later section for the purpose of importing words into the earlier section which confers the right, and thereby altering its plain and unambiguous meaning. To do so would be to run counter to the well-known rules of construction laid down by Patteson J. in *King* v. *Burrell* (1), by Parke B. in *Williams* v. *Roberts* (2), and by the same judge, when Lord Wensleydale, in *Grey* v. *Pearson*. (3) As Lord Selborne said in *Hough* v. *Windus* (4), when dealing with the argument that any other construction than that contended for would make part of the section inofficious or superfluous, there is no such presumption against fullness or even superfluity of expression in statutes or other written instruments as to amount to a rule of interpretation controlling

(1) (1840) 12 A. & E. 460, at p. 468.

(2) (1835) 1 C. M. & R. 676, at p. 680.

(3) (1857) 6 H. L. C. 61, at p. 106.

(4) (1884) 12 Q. B. D. 224, at p. 229.

C. A. 1904

GARBUTT v. DURHAM JOINT COMMITTEE.

what might otherwise be their proper construction. Sect. 36, sub-s. 2, is strongly in favour of the construction contended for by the appellant; for it enables a constable, who was serving in a police force at the time of the passing of the Act, to reckon his service under the previous Acts for the purposes of a pension, and the service under those Acts need not have been continuous. The Divisional Court were therefore wrong in holding that under s. 1 the service must be continuous. [They also cited on this point *Walker* v. *Simpson*. (1)]

Secondly, the certificate of the chief constable cannot be contradicted by evidence. The words "sufficient evidence" in s. 4, sub-s. 2, mean conclusive evidence. The same words in s. 193 of the Merchant Shipping Act, 1894, were held by Bigham J. in *Board of Trade* v. *Sailing Ship Glenpark, Ld.* (2), to mean conclusive evidence. That point was not decided when that case came before the Court of Appeal, the learned judge's judgment being affirmed on another ground. The cases of *Barraclough* v. *Greenhough* (3) and *Hewitt* v. *Taylor* (4), where the words "sufficient evidence" were held not to mean conclusive evidence, turned upon the special provisions of the Acts under consideration in those cases. The certificate states that the service of the appellant has been diligent and faithful service within the meaning of s. 4 of the Police Act, 1890. That certificate was duly given, for it was signed by the chief constable under the general authority given to him by the police authority. The respondents now seek to rebut the statements of the certificate so given under their authority. By s. 4, sub-s. 1, service allowed by the chief constable, after deductions, if any, in respect of sickness, misconduct, or neglect of duty, is to be deemed to be "approved service," and sub-s. 3 of the same section shews that any question as to misconduct or neglect is to be dealt with at the time by the chief constable once for all, and the police authority cannot subsequently reopen and examine into such questions. It might be impossible for the constable, after a considerable lapse of time,

(1) [1903] A. C. 208.
(2) [1903] 2 K. B. 324; [1904] 1 K. B. 682.
(3) (1867) L. R. 2 Q. B. 612.
(4) [1896] 1 Q. B. 287.

to meet before the sessions allegations of misconduct or neglect occurring long before.

Montague Shearman, *K.C.*, and *Meynell*, for the respondents. The words of s. 1 (*a*) taken by themselves naturally import that the twenty-five years' service contemplated by that section is a continuous service; but, if the words of a section are ambiguous, and are reasonably capable of either of two constructions, then the other provisions of the Act may be looked at in order to ascertain which of the two constructions is to be adopted: per Lord Herschell in *Colquhoun* v. *Brooks*. (1) Upon the construction of s. 1 contended for by the appellant, s. 4, sub-ss. 4, 5, would be quite superfluous. Sub-ss. 1 to 3 of s. 4 deal with cases in which the constable remains in the service, and provide for the deduction of periods in respect of sickness, misconduct, or neglect of duty. Sub-s. 5 of s. 4 does not, as suggested, give the constable a right to return to the service, after his training or service with the reserve is at an end. It merely provides that, if he does so return, he shall be entitled to reckon for the purposes of a pension his service before the break occasioned by his being called out for training or service with the reserve. That sub-section would be quite superfluous on the construction of s. 1 contended for by the appellant. The same considerations apply to s. 5, sub-s. 5, though perhaps in a less degree. Again, s. 21 indicates that the service under s. 1 (*a*) must be continuous, for it provides that, in certain cases where a constable leaves the force without a pension, the contributions which he has made to the superannuation fund may be returned to him. There is no provision, if he afterwards returns to the force, for any repayment by him of the amount so returned to him, which shews that he cannot be intended to be allowed to reckon for the purposes of a pension his service previous to his retirement. The effect of s. 1 (*a*) and the subsequent sections taken together is to shew that the general scope of the Act is that the service must as a rule be continuous, but that in certain meritorious cases an exception is made. [They also referred on this point to s. 5, sub-ss. 3, 4, and ss. 10, 11 of the Police Act, 1890.]

(1) (1889) 14 App. Cas. 493, at p. 506.

C. A. 1904

GARBUTT v. DURHAM JOINT COMMITTEE.

With regard to the second point, the Act draws a clear distinction between the functions of the police authority and the chief officer of police for this purpose. Approved service is by s. 4, sub-s. 1, to mean such service as may be certified under the order of the police authority to have been diligent and faithful service, and by s. 4, sub-s. 2, a certificate signed by the chief officer of a police force as to the period of a constable's approved service in the force is to be sufficient evidence thereof. The function of the chief officer of police in this connection is merely to certify the period of the service. The question whether the service has been diligent and faithful is to be certified under the order of the police authority. Moreover, sub-s. 2 only says that the certificate of the chief officer of police "shall be sufficient evidence thereof." There is no decision that such a provision means that the certificate shall be conclusive except in the judgment of Bigham J. in *Board of Trade* v. *Sailing Ship Glenpark, Ld.* (1) But the Court of Appeal did not adopt his view in that case.

Pickersgill, for the appellant, in reply.

Cur. adv. vult.

June 28. COLLINS M.R. This is an appeal against the judgment of a Divisional Court upon a special case stated by quarter sessions upon an application by the appellant by way of appeal under s. 11 of the Police Act, 1890, against the refusal of the respondents to order payment of a pension to him under that Act.

The questions asked by the case are—first, whether the quarter sessions were right in dismissing the application on the ground stated in the case; and, secondly, whether they were right in rejecting the evidence tendered on behalf of the respondents.

The answers to these questions respectively depend on whether the service contemplated by s. 1 (*a*) of the Police Act, 1890, is a continuous service, and whether a certificate signed by the chief officer of a police force as to the period of a constable's approved service in that force under s. 4, sub-s. 2,

(1) [1903] 2 K. B. 324; [1904] 1 K. B. 682.

of the Act is conclusive evidence, so as to debar a police authority who seek to impugn it from giving evidence in contradiction of the statements therein contained. These questions arise upon the true construction of the Police Act, 1890, which is intituled, "An Act to make provision respecting the pensions, allowances, and gratuities of police constables in England and Wales, and their widows and children, and to make other provisions respecting the police of England and Wales."

The Divisional Court have held that the appellant is not entitled to a pension on the ground that the Act contemplates continuous service for the periods therein mentioned as a condition precedent to the right of a police constable to a pension. In this case the service of the appellant had not been continuous, there having been two breaks in it; but, in the aggregate, he had served for twenty-five years. It was contended before the Divisional Court, and before us, that s. 1 (*a*) of the Police Act, 1890, taken by itself, on the face of it imports that the "twenty-five years' approved service" therein mentioned need not be continuous, but it is enough if the aggregate amount of service, though not continuous, extends to twenty-five years; and, that being so, the Court is not entitled to spell out of the Act by reference to other sections in it any construction which would contradict what is contended to be the proper construction of the enactment in question taken by itself. At the outset I must say that I cannot assent to that contention. I think that, at the utmost, all that can be said is that the language of the section is equally consistent with the view that the service must be continuous as with the opposite view; but I am disposed to go further, and to say that primâ facie the meaning is that the service must be continuous. It is not however necessary, I think, to go so far as that. As I have said, I do not think that the case can be put higher than that the language of the section is equally consistent with either view; and, that being so, the Court is entitled to look to the other parts of the Act in order to arrive at the true construction of it. I should have thought that, as a matter of common sense, without any

C. A. 1904

GARBUTT v. DURHAM JOINT COMMITTEE.

Collins M.R.

authority, this would have been clear, but we have been referred to a passage in the judgment of Lord Herschell in the case of *Colquhoun* v. *Brooks* (1), which is exactly in point, and shews that a Court is entitled, in construing the terms of any enactment found in a statute, to consider any other sections of the Act which throw light upon the intention of the Legislature, where the provision of the enacting section is not in itself absolutely clear. That being so, when I come to look at the rest of the Act in this case, I find a series of other provisions which appear to me to throw light on the meaning of s. 1 (*a*). I do not think it necessary to go through these sections at length or to repeat the arguments to be derived from them, all of which will be found in the judgment of the Lord Chief Justice in the Divisional Court, with which the other judges agreed, though Kennedy J. appears to have done so with some misgiving. To put it shortly, there are several other sections in the Act which appear to me, as they did to the Divisional Court, to start from the standpoint that the period of service necessary in order to give a title to a pension must, as a rule, be unbroken, and then proceed to enact with regard to certain special cases that, under the particular conditions existing in those cases, a broken service may, for the purpose of giving a title to a pension, count as though it had been continuous. I cannot explain a series of sections, apparently framed from that standpoint, and on the assumption that, as a general rule, the service contemplated was a continuous service, by the suggestion—which might possibly be deemed valid, if there were only one such section—that they were introduced ex majori cautelâ with regard to the particular cases with which they deal. I find several sections, all of which seem to be framed on the assumption that a break in the service would have the effect of preventing the right to a pension from arising, and to be intended to mitigate the hardship that would so be occasioned in certain exceptional cases for special reasons. If the primary enactment were intended to provide that twenty-five years' service, even though discontinuous, should be as

(1) 14 App. Cas. 493, at p. 506.

effective as if it were continuous, not one of those sections would, as it seems to me, be necessary. It appears to me that it is impossible to reconcile their existence with any other conclusion than that the service contemplated by the primary enactment is a continuous service. As I have said, the Lord Chief Justice has gone through those sections, and I do not propose to do so again, as I think it would only be a waste of the public time. I would only add with regard to another argument, based on the legislation in existence prior to the Act of 1890, which was adduced to us, that I have considered that legislation, but I do not think that it helps us in the construction of the Act of 1890, which was a new departure, and for the first time gave to police constables a right to a pension, it having previously been in the nature of a gratuity. I do not think that any presumption is derivable from the earlier Acts with regard to the meaning of this Act, which, being a new departure, must be construed merely with reference to its own language. For these reasons I think that the appeal must be dismissed.

With regard to the second question raised by the case, it is unnecessary in the view I take to pronounce any opinion upon it, but I am far from being satisfied that the certificate is conclusive evidence.

STIRLING L.J. I am of the same opinion. I must confess that I share to a considerable degree the doubts and regrets expressed by Kennedy J., but, like him, I have come to the conclusion that we ought not to differ from the decision of the Divisional Court. The language of s. 1 (*a*) of the Act, taken by itself, appears to me to be consistent with either of the views which have been pressed upon us. The words "if he has completed not less than twenty-five years' approved service" are, I think, capable of the meaning that the service must be continuous, or the meaning that it may be discontinuous. In that state of things we are, not only entitled, but bound to look at the rest of the Act, in order to see whether there is anything in any of the subsequent sections which throws light on the meaning to be attributed to s. 1 (*a*).

C. A. 1904

GARBUTT v. DURHAM JOINT COMMITTEE.

Stirling L.J.

Looking at the rest of the Act, it seems to me that s. 4, sub-s. 5, has a most important bearing in this respect. I find myself unable to explain the insertion of that sub-section except upon the footing that the Legislature, in framing the 1st section, had in view a continuous service. The same observation applies, though perhaps in a less degree, to s. 5, sub-s. 5, and to s. 21. For these reasons I agree that the appeal must be dismissed. It is unnecessary to express any opinion on the second question raised by the case.

MATHEW L.J. I regret that I feel compelled to differ from the view taken by the Divisional Court and by the Master of the Rolls and my brother Stirling; but I am somewhat consoled in so doing by learning that my brother Stirling shares the doubts and difficulties expressed by Kennedy J. It appears to me that, by treating s. 1 (*a*) of the Act as meaning that the service must be a continuous service, I should be defeating the obvious intention of the Legislature. The Master of the Rolls has expressed an opinion that, if s. 1 (*a*) stood alone, the proper construction of it would be that the service must be continuous. With great deference I am unable to take that view. If the section stood alone, I do not think it could reasonably be contended that, if a constable were absent from the service for a time through illness, he would be debarred from making any claim to a pension, and that, in order to be entitled to a pension, a constable must have been employed day by day continuously for the whole of the period mentioned without any of those breaks which may be occasioned by the ordinary misfortunes to which humanity is subject. The Master of the Rolls has dwelt upon other sections of the Act as leading to the construction which he has adopted, and I will presently refer to those sections. The Act was passed, as it appears to me, for the purpose of affording additional security to police constables in the matter of their pensions. Previously to the Act, as the Master of the Rolls has pointed out, a police constable appears not to have been entitled to a pension as of right, but one might be awarded to him in the discretion of the police authority.

There is no doubt that such authorities would do their best to exercise that discretion fairly, but it seems to have been thought desirable that their decisions should be subject to appeal, and the Act provides for such an appeal to quarter sessions. The main object of the Act appears to me to be to secure a pension to a police officer who has served faithfully for a certain specified length of time. It is argued that the service must have been continuous, but no sufficient reason appears to me to have been given why that should be so. In this case, for example, the respondents rely on the fact that there was a break in the service by reason of the appellant's resignation in 1881, although he was reinstated a few months later, and his service did not ultimately come to an end till 1902. Why should he on account of that break in 1881 be deprived of his claim to a pension? He did nothing wrong in resigning, and did not break any engagement by so doing. In such a case the man may have been a perfectly efficient officer before his resignation, and he may subsequently be reinstated in the service on the same terms as before, and may serve for many years, as happened in the present case, and through all those years may have been diligent and faithful. Why should it be imputed to the Legislature that in such a case it was intended that the man should be deprived of his claim to deferred pay, to which in substance a pension amounts, because of the technicality that there had been a temporary break in the service? I return to the Act, in order to see whether there is any provision to that effect; for, of course, if there were such a provision, we should be bound to act upon it. It is said that an inference to that effect arises from the subsequent sections. I must say that, in my judgment, the severely critical examination of the language of sections which is sometimes applied in cases of this kind hardly does justice to the Legislature, which ought to be assumed to have intended to deal with a subject in a reasonable way and with reference to some reasonable object which was had in view. The terms of the 1st section are, "if he has completed not less than twenty-five years' approved service." Nothing is said about the service being continuous. It is proposed, however, to

C. A. 1904

GARBUTT v. DURHAM JOINT COMMITTEE.

Mathew L.J.

construe those words as meaning "twenty-five years' service, if approved, and if continuous." If these had been the words used, any one reading them would have understood the meaning, but few men would, I think, gather any such meaning from the words that have actually been used.

It is argued that the language of s. 1 must be construed by the light thrown upon it by subsequent sections of the Act. I quite agree that, in construing an Act of Parliament, one must consider all the sections bearing upon the matter in question. The first of the subsequent sections to which our attention has been called is s. 4. It is contended that the service must ordinarily be continuous, because that section provides for three cases in which, although the service is not continuous, nevertheless the constable is not to be disqualified for a pension. Sub-s. 1 provides that "the service of a constable for the purposes of this Act shall be subject to such deductions in respect of sickness, misconduct, or neglect of duty as may be made therefrom in pursuance of the regulations of the force to which the constable belongs; and the expression 'approved service' shall for the purposes of this Act mean such service as may after such deductions as aforesaid (if any) be certified under the order of the police authority to have been diligent and faithful service." The Act therefore recognises in the cases to which that sub-section applies that the service need not be absolutely continuous. Sub-s. 2 provides that "a certificate signed by the chief officer of a police force as to the period of a constable's approved service in that force shall be sufficient evidence thereof." So that apparently, when the constable applies to the police authority for his pension, all he has to do is to produce that document as primâ facie evidence of his right. Those sub-sections were not much dwelt upon in argument by the respondents, but reliance was chiefly placed upon sub-ss. 4 and 5 of s. 4. The argument, as I understand it, is that those sub-sections are in effect to be read as provisoes to s. 1, and as justifying us in reading into that section the words "if continuous," and construing it as meaning that the service mentioned therein must be continuous, except as provided by s. 4, sub-ss. 4, 5. It appears to me

that those sub-sections ought not to be read as provisoes to s. 1, but as distinct and separate enactments introduced, not for the purpose of qualifying that section, but alio intuitu altogether; and they do not, in my opinion, throw any light on the question whether the service contemplated by s. 1 is a continuous service. Sub-s. 4 of s. 4 provides that "where a constable has served in more than one police force in any part of the United Kingdom, approved service in any such police force in which he has completed not less than three years' approved service, and from which he has, with the written sanction of the chief officer of that force, removed to another force, shall be reckoned as approved service in the force in which the constable is serving at the time of his retirement." What is the object of that provision? Such a provision would be unnecessary if, as in Ireland, there were one police force for the whole country. In England, where there are different forces in different districts, it was obviously necessary to make special provision with regard to pensions for cases in which a police constable has removed from one force to another. The scope of this provision is made abundantly clear by reference to s. 15, sub-s. 2, which provides for apportionment of the amount of the pension in such a case between the different districts. It appears to me that one may discard this sub-section altogether for the present purpose, and that it cannot be treated as a proviso to s. 1. With regard to sub-s. 5, the inference appears to me, if possible, still clearer than with regard to sub-s. 4. It provides that, "Where a constable with the knowledge of the police authority, or of the chief officer of his police force, belongs to the army reserve, and is called out for training or for permanent service, he shall be entitled, on returning to the police force after the end of such training or service, to reckon any approved service which he was entitled to reckon at the commencement thereof." What is the object of that sub-section? Clearly, I think, to indicate that, after the end of the training or service with the reserve, the constable is to be entitled to return to the police force with all the rights which he previously enjoyed. I do not think that sub-section throws any light on the question

C. A. 1904

GARBUTT v. DURHAM JOINT COMMITTEE.

Mathew L.J.

whether the service contemplated by s. 1 is continuous service or not. For these reasons I differ from the view taken by the Divisional Court, and I do not think that those sub-sections can be read as qualifying what would otherwise be the proper construction of s. 1. I will briefly call attention to the other sections upon which reliance has been placed. Reference was made to s. 10, which saves the existing right of any police authority to refuse a constable's claim to a pension on account of misconduct or neglect of duty, or on account of any ground on which his pension if granted would be liable to be forfeited. That section must be read in connection with s. 11, which follows it, and which provides that, in a case where a pension has been declared forfeited, or a claim to a pension has been refused, the constable shall have a right of appeal to quarter sessions. I do not think that s. 10 assists in any way the contention for the respondents. Reference was made to s. 5, sub-s. 3. That sub-section provides that "where a pension is granted to a constable on the ground of incapacity for the performance of his duty, the police authority shall, yearly or otherwise, until the power under this Act of requiring the constable to serve again ceases, satisfy themselves that the incapacity continues"; and then there follows the remarkable provision of sub-s. 4, which enacts that "in the event of the incapacity ceasing before the time at which the constable would, if he had continued to serve, have been entitled without a medical certificate to retire and receive a pension for life, the police authority may cancel his pension and require him to serve again in the police force, in a rank not less than the rank which he held before his retirement, and at a rate of pay not less than the rate which he received before his retirement." In the case of a constable being called upon to serve again under that sub-section, it would not be fair that the break in his service through incapacity should prevent his previous service being counted for the purpose of a pension; and accordingly provision is made for that particular case by sub-s. 5, but I cannot see that this provision affords any sufficient ground for the inference that the service for the purposes of s. 1 (*a*) must be continuous. Then reliance was further

placed on s. 21, which provides that, "if a constable not having been dismissed leaves a police force without a pension or gratuity, the police authority may, if it seems to them just, pay him the whole or part of the rateable deductions which have been made from his pay." It was suggested that this provision creates an insuperable difficulty in the way of holding that the service contemplated by s. 1 (*a*) need not be continuous; for it was said, if a constable were repaid the amounts so deducted from his pay on resignation, and afterwards returned to the force, there is no provision for any return by him of the money so repaid to him. I do not think that there is any such difficulty as suggested. The police authority are not bound to take the constable back into their service, and, if they take him back, they may do so on reasonable terms as to his repaying, or submitting to a deduction from his pension in respect of, the amount which has been so repaid to him. The last section relied on was s. 36, sub-s. 2, which provides that the repeal of the previous Acts mentioned in that section "shall not prevent any constable from reckoning as approved service any service which he is entitled under any enactment hereby repealed to reckon towards pension or superannuation." That section shews that under the Act a constable whose service began before the passing of the Act may reckon for the purpose of a pension service under the previous enactments, which need not have been continuous. I do not think that section helps the respondents. For these reasons I think that the appeal should be allowed.

In the result it becomes unnecessary to decide the second question raised by the case; but, in relation to that question, I wish to add that, if, as appears to me not improbable, the decision in this case should lead to further legislation for the protection of a constable who has resigned for reasons not involving anything blameworthy on his part, and has returned again to the service, I would venture to point out the desirability of providing some machinery other than that contained in the present Act for qualifying or reviewing the decision of a police authority with regard to a claim for a pension. I cannot conceive a more serious burden on a

C. A. 1904

GARBUTT v. DURHAM JOINT COMMITTEE.

Mathew L.J.

constable than that he should have upon an application before quarter sessions after the lapse perhaps of many years to prove the circumstances under which he formerly left the force for a time, or the facts with regard to some alleged neglect of duty on his part. I really do not know how a constable can be expected to meet the exigencies of a judicial inquiry into such matters after a long interval of time.

Appeal dismissed.

Solicitors for appellant: *Bell, Brodrick & Gray, for Geipel, West Hartlepool.*

Solicitors for respondents: *Maude & Tunnicliffe, for Simey, Son & Iliff, Sunderland.*

E. L.

C. A. 1904 *July* 1.

[IN THE COURT OF APPEAL.]

BATEMAN AND ANOTHER *v.* HUNT AND OTHERS.

Assignment—Mortgage—Notice—Notice by Executors of Assignee—Acknowledgment in Deed by Mortgagor of receipt of Money—Right to recover Amount acknowledged—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

A solicitor was instructed by the defendants to procure a loan of a specified amount on the security of property belonging to them. A mortgage deed was prepared and executed by the defendants, purporting to be in consideration of the specified amount, the receipt whereof was acknowledged in the body of the deed. The solicitor himself advanced a sum of money the amount of which was disputed, but the deed was made out in the name of a clerk in the solicitor's office as mortgagee. The mortgage debt was subsequently assigned to the solicitor and by him, by way of sub-mortgage, to the plaintiffs' testator, for whom he was also acting as solicitor for the investment of money on mortgage. The solicitor and the testator of the plaintiffs died without giving to the defendants any notice of the assignments, but notice was subsequently given by the plaintiffs of both assignments, and this action was brought in their names upon the covenants in the principal deed to recover the amount specified therein:—

Held, that, as the plaintiffs were entitled in equity to all the rights of the mortgagee under the principal deed, the notice of the assignments

given by them was effectual to give them a legal title to sue upon the covenants contained in that deed:

Held, also, that the testator of the plaintiffs not having had actual or constructive notice that the amount specified in the mortgage deed had not been paid, the plaintiffs were entitled to rely on the acknowledgment contained in that deed, and to recover the amount therein stated to have been received.

Bickerton v. *Walker*, (1885) 31 Ch. D. 151, applied.

THE following statement of the facts of the case is taken from the judgment of the Court.

In this action the plaintiffs are the legal personal representatives of Thomas Connock Elliott, deceased, and sue the defendants on a covenant for payment of 9200*l.* in a mortgage deed made by the defendants to one Thomas Charles Line, which mortgage the plaintiffs assert to have been duly transferred to their testator. The plaintiffs make out their title by the following documents.

By an indenture dated July 1, 1898, and made between the defendants, thereinafter sometimes called the mortgagors, of the one part, and Thomas Charles Line, described as of Chiswick, in the county of Middlesex, gentleman, thereinafter called the mortgagee, of the other part, after reciting, amongst other things, that the mortgagee had agreed to lend to the mortgagors on joint account the sum of 9200*l.* upon having the repayment thereof, with interest, secured in manner thereinafter appearing, it was witnessed that, in pursuance of the said agreement and in consideration of the sum of 9200*l.* then paid by the mortgagee to the mortgagors (the receipt whereof the mortgagors thereby acknowledged), the mortgagors jointly and severally covenanted with the mortgagee to pay to him in September then next the sum of 9200*l.*, with interest thereon in the meantime at the rate of 4*l.* 10*s.* per cent. per annum from the date thereof; and the mortgagors thereby granted and assigned to the mortgagee certain property therein particularly described, subject to a proviso for redemption therein contained.

By an indenture dated January 1, 1899, between Thomas Charles Line, described as of Chiswick, in the county of Middlesex, gentleman, thereinafter called the transferor, of the

C. A. 1904

BATEMAN v. HUNT.

one part, and Cartmell Harrison, described as of 67, Lincoln's Inn Fields, in the county of London, Esquire, thereinafter called the transferee, of the other part, after reciting that the said indenture was supplemental to the said indenture of July 1, 1898, and that the principal sum of 9200*l.* was still owing to the transferor on the security of the said principal indenture with current interest, and the transferee had agreed to pay to the transferor the sum of 9200*l.* upon having such transfer as thereinafter expressed of the said principal sum of 9200*l.* and the interest to grow due thereon and the securities for the same, it was witnessed that, in pursuance of the said agreement and in consideration of the sum of 9200*l.* paid to the transferor by the transferee (the receipt whereof the transferor thereby acknowledged), the transferor as mortgagee thereby assigned unto the transferee all that the principal sum of 9200*l.* then owing on the security of the principal indenture and the interest thenceforth to become due for the same and the full benefit of and the right to exercise and enforce all powers and securities for compelling payment of the said sum and interest, to have and receive the same unto the transferee absolutely; and the transferor thereby granted and assigned to the transferee all the property granted by the principal indenture subject to the right of redemption subsisting therein under the principal indenture.

By an indenture dated January 4, 1899, and made between Cartmell Harrison, of 67, Lincoln's Inn Fields, in the county of London, Esquire, thereinafter called the mortgagor, of the one part, and Thomas Connock Elliott, thereinafter called the mortgagee, of the other part, after reciting that this indenture was supplemental to the following indentures: (*a*) The principal indenture, dated July 1, 1898, being a mortgage to secure the repayment of the principal sum of 9200*l.* and interest; and (*b*) an indenture dated January 1, 1899, and made between the said Thomas Charles Line of the one part, and the mortgagor of the other part, being a transfer of the said mortgage debt and the securities for the same; and that the principal sum of 9200*l.* still remained owing to the mortgagor on the security of the principal indenture, and that the mortgagee

had agreed to lend to the mortgagor the sum of 6000*l.* upon the security as hereinafter mentioned: it was witnessed that in consideration of the sum of 6000*l.* paid to the mortgagor by the mortgagee, the mortgagor as beneficial owner thereby assigned unto the mortgagee the said principal sum of 9200*l.* then due and owing to the mortgagor on the security of the principal indenture and all interest then due and thenceforth to become due for the same and the benefit of all securities for the same, together with full power to demand, sue for, recover, and receive, and give effectual receipts and discharges for the said principal sum and interest in the name of the mortgagor or otherwise, to hold the same unto the mortgagee subject to the proviso for redemption thereinafter contained; and it was also witnessed that, for the consideration aforesaid, the mortgagor as beneficial owner thereby conveyed unto the mortgagee all the property granted by the principal indenture and then vested in the mortgagor subject to redemption and subject to such right or equity of redemption as the same were then subject to by virtue of the principal indenture, and also subject to the proviso for redemption thereinafter mentioned, being a proviso for redemption on payment by the mortgagor to the mortgagee of the sum of 6000*l.* with interest thereon in the meantime at the rate of 4*l.* 5*s.* per cent. on November 4 then next. This rate of interest, it will be seen, was less than the rate of interest secured by the principal indenture of July 1, 1898.

It may be mentioned that by another indenture dated June 5, 1899, and made between Cartmell Harrison of the one part, and T. C. Elliott of the other part, which contained no reference to the sub-mortgage of January 4, 1899, Harrison purported to sub-mortgage the security of July 1, 1898, to Elliott to secure 8000*l.*, but it was admitted that the title of the plaintiffs under the sub-mortgage of January 4, 1899, if valid, was sufficient to enable them to maintain the present action.

Harrison died in November, 1899, shortly after a receiving order in bankruptcy had been made against him. T. C. Elliott died in 1901. No notice of the deeds of January 1, 1899, or

C. A. 1904

BATEMAN v. HUNT.

January 4, 1899, was given either by Harrison or by Elliott; but on June 3, 1902, the plaintiffs gave to the defendants notice in writing of both deeds. The action was brought on June 16, 1902. At the trial Line was called as a witness for the plaintiffs, and gave evidence to the effect that he was an accountant, and had been for forty years in the employment of Messrs. Ingram, Harrison & Ingram, solicitors, of Lincoln's Inn Fields, in which firm Cartmell Harrison was a partner; that he remembered Harrison taking a security in his name in 1898; that after July, 1898, he remembered Harrison coming into his room and wanting him to execute a transfer of the security to Elliott; but he objected to make the transfer because he might be liable; that he then looked into the accounts in the firm's ledger, and 6000*l.* appeared to have been advanced so far as he remembered; that he resented the transaction of having the mortgage made in his name, and he executed the transfer back to Harrison in January, 1899, but that he had previously executed a declaration of trust and got it destroyed when he executed the transfer. He heard of the deed of July, 1898, within about a month of its execution.

Both the defendants and Elliott were clients of Cartmell Harrison. The defendants borrowed money of him. Elliott placed money in his hands for the purpose of being invested on mortgage. The accounts kept by Harrison were put in evidence and were referred to by both parties; but it did not appear from them that the full sum of 9200*l.* had been advanced to the defendants on July 1, 1898. A correspondence was referred to as containing an admission by the defendants that that sum had been advanced. One of the defendants, who presumably had knowledge on the subject, was not called, though present at the trial. In the result the learned judge held that the plaintiffs' case was made out, and he gave judgment for the full amount claimed. From this decision the defendants appealed.

June 16. *Levett, K.C.*, and *J. A. Simon*, for the defendants. Upon the evidence the learned judge was wrong in finding that the full sum of 9200*l.* was advanced by Harrison to the

defendants. The proper conclusion from the evidence is that only about 6000*l.* had been so advanced. The plaintiffs are suing in their own names as legal owners of the mortgage debt under the mortgage of 1898 by virtue of the Judicature Act, 1873, s. 25, sub-s. 6. But they are not entitled so to sue. No notice of the deeds of January 1 and 4, 1899, having been given to the defendants by Harrison or Elliott, neither of them ever had a legal title to the mortgage debt; and the notice given after their deaths by the plaintiffs cannot give the plaintiffs such a title. The plaintiffs are only entitled to sue in the name of the mortgagee, Line, as assignees of the rights of Harrison, who was an equitable assignee. They can stand in no better position than Harrison would have done, and they are not entitled to maintain the action without joining Line and Harrison's trustee in bankruptcy. If Line had been made co-plaintiff in the action, and had stated, as he did, in the witness-box that only 6000*l.* had been advanced by Harrison to the defendants, the plaintiffs could not possibly have recovered more, unless they were entitled to rely on the receipt contained in the mortgage deed of 1898. But they are not so entitled. Even assuming that the plaintiffs have acquired a legal title to the mortgage debt of 9200*l.*, their title is, by the express terms of the Judicature Act, 1873, s. 25, sub-s. 6, subject to all equities which would have had priority over it if the Act had not passed. Line had really no interest, and was a mere nominee of Harrison. It is a well-established rule in equity that a solicitor cannot take a mortgage from his client for more than the amount actually advanced, and cannot rely on any statement in the mortgage deed as evidence of that amount, but must prove it independently: *Lewes* v. *Morgan* (1); *Gresley* v. *Mousley*. (2) The plaintiffs, as representing Elliott, who was only equitable assignee from Harrison, or, even if they were legal owners of the mortgage debt under the Judicature Act, 1873, were affected with constructive notice of the facts, and so would be in the same position as Harrison. Harrison acted as solicitor both for Elliott and the defendants in the matter; and, when he applied to Line to execute a transfer of

(1) (1817) 5 Price, 42. (2) (1862) 3 De G. F. & J. 433.

C. A. 1904

BATEMAN v. HUNT.

the mortgage of 1898 to Elliott, must have been taken to have been acting as Elliott's solicitor. If another solicitor had been employed by Elliott, it would have been his duty to make such inquiries of Line that he would most certainly have learned that the amount of 9200*l.* had not been actually advanced to the defendants, but a less amount; and, therefore, by virtue of the Conveyancing Act, 1882, s. 3, sub-s. 1 (ii.), the plaintiffs' testator must be taken to be affected with constructive notice of the fact.

Rufus Isaacs, *K.C.*, and *Lewis Thomas*, for the plaintiffs. There was evidence upon which the learned judge was entitled to find that the whole of the sum of 9200*l.* had been advanced to the defendants, one of whom was present in Court and was not called as a witness; and it is submitted that his finding to that effect was correct. If that be so, no question of law arises.

On the assumption that less than 9200*l.* was advanced to the defendants, the plaintiffs are still entitled, in the absence of circumstances to arouse suspicion, to rely upon the recital in the deed of 1898: *Bickerton* v. *Walker*. (1) As to the Conveyancing Act, there was nothing in the circumstances of the case to put Elliott upon inquiry. He was looking out for a mortgage through the agency of his solicitor, Harrison, and there was nothing to shew that Harrison was solicitor for the defendants. Line was not a solicitor. Even if Elliott had employed another solicitor, he would not have had to do more than inquire if anything had been paid off, and in the actual relationship between all the parties an inquiry of Harrison could have produced no result.

With regard to the deed of January 4, 1899, between Harrison and Elliott, it was not disputed that it was an absolute assignment within s. 25, sub-s. 6, of the Judicature Act, 1873; nor is it disputed that Elliott had entrusted 8000*l.* beyond the 6000*l.* mentioned in that deed to Harrison for investment.

Upon the question of notice of the assignments, the plaintiffs by giving notice have completed their legal title, and can bring the action in their own right without joining either Line or Harrison's trustee in bankruptcy.

(1) 31 Ch. D. 151.

[They also cited *London Freehold and Leasehold Property Co.* v. *Suffield.* (1)]

Levett, K.C., in reply.

Cur. adv. vult.

July 1. The judgment of the Court (Collins M.R., Stirling L.J., and Mathew L.J.) was read by

STIRLING L.J. [The Lord Justice, after stating the facts as above set out, continued :—] The defendants contended before us that the evidence did not warrant the conclusion arrived at in the Court below as to the amount advanced by Harrison to the defendants ; but, although that evidence is far from satisfactory, and the transaction remains in considerable obscurity, we are not prepared to differ from the learned judge.

The plaintiffs, however, insisted that, even if a less sum than 9200*l.* was actually advanced, they were entitled to rely on the express statement contained in the deed of July 1, 1898, under the hands and seals of the defendants, that that sum had been received by them, and it appears desirable to deal with this part of the case, which was very fully discussed before us. It was contended on behalf of the defendants that the plaintiffs were not entitled to sue the defendants at law, and that their rights were equitable only. Now the action is brought under the provisions of the Judicature Act, 1873, s. 25, sub-s. 6, which provides that "any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice. . . ." It was not disputed that the deed of January 4, 1899, although only a sub-mortgage, constituted an absolute assignment within the meaning of the enactment : see *Durham Brothers* v.

(1) [1897] 2 Ch. 608.

C. A. 1904

BATEMAN v. HUNT.

Stirling L.J.

Robertson (1); *Hughes* v. *Pump House Hotel Co.* (2); but it was said that as Harrison and Elliott never gave any notice of the deeds of January 1 and 4, 1899, to the defendants, neither of them ever acquired a legal title to the debt, and that the notice given by the plaintiffs before the bringing of this action, coming as it did after the death of Harrison, was not effectual to give them a legal title to sue. We are unable to assent to this argument. It is indeed true that neither Harrison nor Elliott ever acquired a legal right to sue the defendants. Still, each of the deeds of January 1 and 4, 1899, is an "absolute assignment by writing under the hand of the assignor" of the debt due to Line under the deed of July 1, 1898, and under or by virtue of those deeds the plaintiffs, as the legal personal representatives of Elliott, have become and are entitled in equity to all the rights of Line under the deed of July 1, 1898. In order that this title should become effectual at law as well as in equity, all that the statute requires is that "express notice in writing" should be given to the debtor, and such notice was given by the plaintiffs before action brought. The statute prescribes no limit of time within which notice must be given, nor does it lay down that the notice must be given by any particular person; and we can see no good ground for holding that the notice given by the plaintiffs was ineffectual. Certainly no such limitations were found in the rules of the Courts of Equity on whose practice the statutory enactments were probably founded: see *Lloyd* v. *Banks*. (3)

It was then said (and correctly) that the plaintiffs' right even if legal was by the express terms of the statute subject to all equities which would have been entitled to priority if the Judicature Act had not passed. The equity claimed on behalf of the defendants was based on the rule laid down with respect to securities in *Lewes* v. *Morgan* (4), and applied to conveyances in *Gresley* v. *Mousley* (5): that a solicitor taking a security or conveyance from his own client cannot rely on any statement in the instrument as to the amount advanced or

(1) [1898] 1 Q. B. 765.
(2) [1902] 2 K. B. 190.
(3) (1868) L. R. 3 Ch. 488.
(4) 5 Price, 42.
(5) 3 De G. F. & J. 433.

paid by him to the client, but must prove it by independent evidence. Line, it was said, was a mere trustee for Harrison, who could not be allowed to escape from the rule by taking the mortgage in the name of a trustee instead of to himself directly. To this it was answered that on the face of the deeds there was nothing to shew that Line was a trustee for Harrison; that there was no evidence that Elliott knew that the full sum of 9200*l.* had not been advanced, and that, however the case might have stood as between Harrison and the defendants, the case of *Bickerton* v. *Walker* (1) was a binding authority in support of the proposition that the plaintiffs were entitled to rely on the express statement as to the receipt by the defendants of 9200*l.* contained in the deed of July 1, 1898. In that case a mortgage was executed as security for the repayment of 250*l.* There was in the body of the deed an acknowledgment by the mortgagor of the receipt of that sum, and a receipt signed by him for the amount was indorsed. The mortgage was shortly after its execution transferred to a transferee, who had no notice that the full sum of 250*l.* had not been advanced. Afterwards the mortgagors brought an action alleging that they had received 91*l.* only, and claiming redemption on repayment with interest of what they had actually received. The Court of Appeal considered that the evidence was sufficient to entitle the mortgagors to judgment on that footing as against the original mortgagee, but held that as against the transferee who had no notice that the full amount had not been advanced, the account must be taken on the footing of its having been advanced. Fry L.J., in delivering the judgment of the Court, says (2): "We are of opinion that if an assign is willing to take the risk of any payment having been made after the date of the mortgage he is not guilty of carelessness or negligence if, in the absence of any circumstances to arouse suspicion, he relies upon the solemn assurance under the hand and seal of the mortgagor as to the real bargain carried into effect by the mortgage deed, upon the possession of that deed by the mortgagee, and upon the receipt for the full amount of the mortgage money under the hand of the mortgagor." The mortgage in

(1) 31 Ch. D. 151. (2) 31 Ch. D. at p. 158.

C. A. 1904

BATEMAN v. HUNT.

Stirling L.J.

that case bore date in 1879, and the indorsed receipt was in conformity with the practice of conveyancers at the time. In the present case the deed of July 1, 1898, has no receipt indorsed, but it is provided by the Conveyancing Act, 1881, s. 55, that "a receipt for consideration money in the body of a deed shall, in favour of a subsequent purchaser not having notice that the money thereby acknowledged to be received was not in fact paid wholly or in part, be sufficient evidence of the payment of the whole amount thereof." The absence, therefore, of an indorsed receipt does not prejudice the plaintiffs.

It was, however, contended that Elliott had, not actual, but constructive notice that the full amount had not been paid. This was sought to be made out as follows: It was said that when Harrison appealed to Line to execute a transfer to Elliott he must be taken to have been acting as Elliott's solicitor, and that if an independent solicitor had been employed by Elliott and had made the like application to Line, he would have discovered the whole truth; and consequently that Elliott was brought within the terms of the Conveyancing Act, 1882, s. 3, sub-s. 1, which provides that "a purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless (ii.) in the same transaction with respect to which a question of notice to the purchaser arises, it would have come to the knowledge of his solicitor or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent." Now the transaction in which Harrison was employed by Elliott was to find a security suitable for the investment of money placed by Elliott in Harrison's hands. Harrison was at the same time the owner of a security which he desired to make available for Elliott's purposes. An independent solicitor employed by Elliott would have dealt with Harrison, not with Line; and it seems improbable that he would ever have come in contact with Line, especially if it was the object of Harrison (as there is ground for supposing) to pass off the deed of July 1, 1898, as a security on which the full amount of 9200*l.* had been advanced. His application to

Line ought to be regarded as made, not on behalf of Elliott, but in his own right as equitable owner of the mortgage of July 1, 1898. We are, therefore, unable to arrive at the conclusion that the true facts as to the amount advanced or the position of Line would have come to the knowledge of an independent solicitor employed by Elliott. On the whole we are of opinion that the principle laid down in *Bickerton* v. *Walker* (1) applies to the present case, and that the plaintiffs have a better equity than the defendants. The appeal, therefore, fails and must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Morgan, Upjohn & Leech.*
Solicitors for defendants: *Hunter & Haynes.*

A. M.

[IN THE COURT OF APPEAL.]

MAYOR, ALDERMEN, AND COUNCILLORS OF HACKNEY *v.* LEE CONSERVANCY BOARD.

Metropolis Management Acts — Street — Paving Expenses — "Owner" — Rack-rent—Conservators of Navigation—Land used as Embankment of River—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 105, 250—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77.

The conservators of a public navigable river purchased under their statutory powers a strip of land, which they used for the purpose of a retaining bank for the waters of a cut forming part of the navigation. They were empowered to take tolls for the use of the navigation, but any moneys received by them under their Acts were applicable only to payment of the expenses of carrying out their Acts, and of moneys borrowed for the purposes of those Acts, and interest thereon, and not to any purposes of profit beyond what might be necessary for such payment. They had power to construct docks, wharves, and other works on the river, and to sell any lands vested in them which they might not require for the purposes of their Acts. It appeared that it would be possible, if a retaining wall were substituted for the bank, that the residue of the before-mentioned land might be otherwise applied for purposes of profit:—

Held, that the conservators were "owners" of the land within the

(1) 31 Ch. D. 151.

C. A.
1904
HACKNEY CORPORATION v. LEE CONSERVANCY BOARD.

definition given by the Metropolis Management Act, 1855, s. 250, and therefore liable under the Metropolis Management Acts to contribute in respect of it to the paving expenses of a new street on which it abutted.

APPEAL from the judgment of Wright J. in an action tried by him without a jury.

The action was brought by the plaintiffs to recover from the defendants, who were conservators of the river Lee, a sum of 300*l.* 2*s.* 6*d.*, being the amount apportioned on the defendants, as owners of land abutting upon a new street, called Maiwand Road, in respect of the expenses of paving the street under the Metropolis Management Acts.

The land in respect of which the apportionment was made on the defendants was a strip of land of an average width of about 26 feet, which abutted upon the new street to the extent of 284 feet. It was used as a retaining bank forming part of the bank of a navigable cut of the river Lee, called Hackney Cut, which was under the control of the defendants, for the purpose of strengthening the bank, and for no other purpose. It had been purchased in 1849 by the defendants' predecessors, the trustees of the Lee Navigation, under their statutory powers for the purposes of their Acts. The conveyance of it reserved to the vendors a right during the lives of certain persons and the survivor of them, and twenty-one years from the decease of the survivor, to construct upon the piece of land conveyed, or partly on that land and partly on adjoining land, a dock or docks, landing-place or landing-places, or a wharf or wharves, so as to have the right of using the river Lee for the shipment or unshipment, loading or unloading, conveyance and transit of goods. The period covered by this reservation had not yet quite expired. The defendants' powers were derived from a number of local Acts. These Acts were very voluminous, beginning with 13 Eliz. c. 18, and ending with the Lee Conservancy Act, 1900 (63 & 64 Vict. c. cxvii.), but it is thought that the following summary of such of their provisions as appear most material to the case will be sufficient for the purposes of this report. By an Act 7 Geo. 3, c. li., intituled "An Act for improving the navigation of the river Lee from the town of Hertford to the river Thames, and for extending

the said navigation to the flood-gates belonging to the town mill in the said town of Hertford," certain trustees, of whom the defendants were the successors, were appointed for the making, extending, improving, and maintaining the navigation of the river Lee, and were empowered from time to time to cleanse, scour, deepen, enlarge, or straighten the channel or course of the river, to make and maintain certain new cuts or canals, among which was the Hackney Cut, and to do a number of other works specified, and to remove obstructions and impediments to navigation, and generally to do and perform all acts, matters, and things which they should think necessary for the purpose of making, extending, and improving the navigation of the river Lee, and to enable them to execute the powers thereby vested in them. The Act gave the trustees power to take lands compulsorily for the purposes of the Act. It was by the Act declared that the said navigation should thenceforth be a free navigation, and that all the King's liege people should enjoy free passage along the channel of the river and the new cuts for boats, barges, lighters, and other vessels, and also the use of the towing-paths and all other necessary and convenient liberties for navigating the same, without let, hindrance, or obstruction, subject to the payment of certain rates or duties which the trustees were authorized by the Act to take for passage along the navigation, and to by-laws to be made by them for the regulation of the navigation. It was further provided that all sums of money to be raised or paid by virtue of the Act should be vested in the trustees, and should be applied in the first place in discharging the expenses incurred in and in relation to obtaining the Act, and afterwards in making certain payments directed by the Act to be made, in performing the several contracts and agreements entered into by the trustees in pursuance thereof, and for improving, completing, and maintaining the navigation and carrying the Act, and the several provisions, powers, and authorities therein contained, into effectual execution, and to no other use or purpose whatsoever. Power was given to the trustees to borrow money at interest for the purposes of the Act on the security of mortgages of the rates and tolls leviable

C. A. 1904

HACKNEY CORPORATION v. LEE CONSERVANCY BOARD.

under the Act, and to raise money by annuities charged on the rates and tolls. After certain intermediate Acts amending the original Act, by 13 & 14 Vict. c. cix., intituled "An Act to alter and amend the Acts relating to the navigation of the river Lee in the counties of Hertford, Essex, and Middlesex, and to enable the trustees further to improve the navigation, and to dispose of the surplus water, and for other purposes," the trustees of the Lee Navigation were (inter alia) empowered to do certain new works, and to borrow for that purpose further sums of money on the security of the tolls, rates, and duties leviable under their Acts on persons using the navigation. By s. 14 of the Act they were authorized (inter alia) to construct all such new locks, docks, wharves, lay-byes, tumbling bays, waste weirs, draw-gates, bridges, roads, towing-paths, and other works upon, over, or across the river Lee as in their discretion they might think proper. They were further empowered to sell surplus water to the East London Waterworks Company and other water companies. It was further provided that all moneys raised under the Act should be applied for and towards the purposes of the recited Acts and that Act, or to any other purposes which the trustees were by law authorized to carry into effect. By the Lee Conservancy Act, 1868 (31 & 32 Vict. c. cliv.), intituled "An Act to make better provision for the preservation and improvement of the river Lee, and its tributaries and other purposes," a board of conservators was constituted for carrying the Act into execution, and incorporated under the title of the Lee Conservancy Board, to whom the powers of the trustees under the before-mentioned Acts were transferred, and in whom all the navigation and the works, property, rights, and interests connected therewith were vested; and it was provided by s. 63 that, "except as in this Act otherwise expressly provided, the tolls levied and all income received by the Conservancy Board shall, so long as any portion of the debentures granted by the trustees previous to the passing of this Act, or any interest thereon, shall remain undischarged, be applied solely to the purposes for which income received by the trustees under the Lee Navigation Improvement Acts was at the passing of this Act by law

applicable, but, after the discharge of such debentures, such tolls and income shall be applied to the purposes of the said Lee Improvement Acts and the general purposes of this Act." By s. 64 of the Act it was provided that "the expenses incident to all the powers and duties under the Lee Navigation Improvement Acts shall be considered as among the purposes for which income received by the trustees under those Acts is at the passing of this Act by law applicable." Provision was made by the Act for the execution of certain new works, and for further borrowing of money for that purpose from the Public Works Loan Commissioners. Sect. 115 of the Act provided that the Conservancy Board might, subject to the provisions of the Act, sell or dispose of any lands for the time being vested in them which in their judgment were not required for any of the purposes of the Act, and that the money produced by any such sale or disposition should be applied in or towards extinction of debenture debt existing at the establishment of the Conservancy Board, and subject thereto to any other purposes for which capital was applicable under the Act.

There did not appear to be any express power given by any of the defendants' Acts to let lands vested in them under their Acts. It appeared to be possible, if a retaining wall were substituted for the embankment, that the residue of the beforementioned land might be otherwise applied for purposes of profit.

The learned judge gave judgment for the defendants, holding that they were not "owners" of the land in question within the definition contained in s. 250 of the Metropolis Management Act, 1855.

T. Beven, *Macmorran*, *K.C.*, with him, for the plaintiffs. The defendants are "owners" of the land in question within the meaning of the Metropolis Management Act, 1855, s. 250, and that of the Metropolis Management Amendment Act, 1862, s. 77. In order that a person may be an "owner" within the meaning of those sections, it is not necessary that he should actually receive a rack-rent for the land, or even be able himself to let it; it is sufficient that, if the land were let at a rack-rent, he would receive it. It is immaterial for this purpose that the

C. A. 1904

HACKNEY CORPORATION v. LEE CONSERVANCY BOARD.

existing owner of land is subject to restrictions which prevent him from letting the land. In order that the owner of the land should not be an "owner" within the meaning of the before-mentioned sections, the land must be for ever dedicated to public purposes incompatible with its being let at a rack-rent, or used for earning a pecuniary profit: see *Wright* v. *Ingle* (1); it must be, to use the language of Lord Watson in *Great Eastern Ry. Co.* v. *Hackney Board of Works* (2), placed "extra commercium." "Rack-rent" for this purpose does not necessarily mean the full rent at which the land could be let, if the use of it were not subject to any statutory restrictions: *St. Giles, Camberwell Vestry* v. *London Cemetery Co.* (3) "Rack-rent" for this purpose means the best beneficial rental which under the circumstances can be considered obtainable, the fair annual value of the land. It is impossible to say that the land here in question is placed extra commercium, or that it is by statute dedicated in perpetuity to such public purposes as for ever to exclude the possibility of its being let at a rent, or having any annual value to its owners. The principles laid down with reference to the poor-rate in *Mersey Docks Trustees* v. *Cameron* (4) and in *Mersey Docks Trustees* v. *Gibbs* (5) are also applicable to the present case. The defendants do, through their undertaking, to part of which the land in question is necessary, earn large profits. It is really immaterial that the undertaking is not carried on for the purpose of earning private profits over and above what is necessary to meet the outgoings and to recoup the principal of and pay interest on moneys borrowed. The defendants derive large sums from tolls for the use of the navigation, and docks, wharves, and other works in connection therewith, which sums are employed, after payment of outgoings, in paying an income to the holders of their securities. The case therefore does not come within the principle of the decision in *London County Council* v. *Wandsworth Borough Council* (6), where it

(1) (1885) 16 Q. B. D. 379.
(2) (1883) 8 App. Cas. 687.
(3) [1894] 1 Q. B. 699.
(4) (1865) 11 H. L. C. 443.
(5) (1866) L. R. 1 H. L. 93; 11 H. L. C. 686.
(6) [1903] 1 K. B. 797.

was held that the owners of a common dedicated for ever by statute to the public for purposes of recreation, and the expenses of which far exceeded certain trifling profits earned, were not owners within the meaning of the Metropolis Management Acts. It is not clear that the defendants could not under their Acts let this land for a rent consistently with the use of it as an embankment, but that is not the test. It is not enough, according to the authorities, for them to shew that, while in their hands, it cannot be let. In order to make out that they are not owners within the meaning of the Metropolis Management Acts, they have to shew that the land is dedicated to public purposes for ever in such wise as for ever to be incapable of profitable occupation by anybody. The defendants have power to sell any lands not required for the purposes of their undertaking. It would be possible for the defendants under their powers to build a retaining wall, in substitution for the embankment, to prevent the water from escaping, and, after the reservation in the conveyance had expired, to sell the land or to utilize it for wharves or landing-places. [He also cited *London and North Western Ry. Co.* v. *St. Pancras* (1); *Clyde Navigation Trustees* v. *Adamson* (2); *Leith Harbour Commissioners* v. *Inspector of the Poor* (3); *Greig* v. *University of Edinburgh* (4); *Forbes* v. *Lee Conservancy Board* (5); *Rex* v. *Nicholson* (6); *Thames Conservators* v. *Pimlico Ry. Co.* (7); *Reg.* v. *Trustees of River Lee.* (8)]

Avory, K.C., E. Morten with him, for the defendants. The defendants are not "owners" of this land within the meaning of the Metropolis Management Acts, because it is not and cannot be let at a rack-rent. It forms in its present condition part of the bank of a public navigable river, and is only used, or capable of being used, as such bank for a purpose essential to the existence of the navigation. The conveyance of it in 1849 really recognises it as forming part of the natural bank of the cut. It is submitted that for the present purpose it must be

(1) (1868) 17 L. T. 654.
(2) (1865) 4 Macq. 931.
(3) (1866) L. R. 1 H. L., Sc. 17.
(4) (1868) L. R. 1 H. L., Sc. 348.
(5) (1879) 4 Ex. D. 116.
(6) (1810) 12 East, 330; 11 R. R. 398.
(7) (1868) L. R. 4 C. P. 59.
(8) (1855) 19 J. P. 310.

C. A. 1904

HACKNEY CORPORATION v. LEE CONSERVANCY BOARD.

considered as it exists in its present condition, and that dubious and fanciful speculations as to its possible use, if structural alterations were possible, and were effected, ought to be disregarded, as the suggestion in *Great Eastern Ry. Co.* v. *Hackney Board of Works* (1) as to the possible user of the parapet walls there in question for advertisements was disregarded. As a river bank diminishing at the top to a width of about from ten to fifteen feet, the land is not capable of being let. The defendants hold it as an essential part of the river, which is by statute dedicated to public purposes as a navigation, just as they hold the bed of the river; and any sums which they receive from tolls they are bound to apply to the purposes of the undertaking, in which is included the recoupment of the money borrowed for the purposes of it. The defendants have no power under their Acts to let any lands acquired by them, and no person would give a rent for the land so dedicated and so used. Assuming that the land in question is rateable, the authorities which have been referred to with regard to the question of rateability to poor-rate are not applicable to paving expenses. It does not follow that, because there is beneficial occupation of land for the purposes of poor-rate, and the occupiers of it would consequently be liable to poor-rate, therefore the owners of the land must be "owners" within the meaning of the Metropolis Management Acts. The same considerations do not apply. The poor-rate is a public burden which has to be borne by all the occupiers of property in a parish. The policy of Acts like the Metropolis Management Acts is to throw improvement expenses on the class of persons who are likely to be benefited by the works of improvement, as ordinary frontagers are by works of street improvement. The owners of land which is only used as the bank of a navigable river are not benefited by such works. This case is really covered by the decision of the House of Lords in *Great Eastern Ry. Co.* v. *Hackney Board of Works* (1), and by *London County Council* v. *Wandsworth Borough Council.* (2) In *Thames Conservators* v. *Port of London Sanitary Authority* (3) it

(1) 8 App. Cas. 687. (2) [1903] 1 K. B. 797.
(3) [1894] 1 Q. B. 647.

was held that a body may be the owners of land for public purposes, such as the preservation and improvement of a navigation, and yet not owners within a definition contained in the Public Health (London) Act, 1891, in the same terms as that now in question. Similarly the defendants are owners here only for the purpose of maintaining the navigation, and not within the definition contained in the Metropolis Management Act, 1855. The defendants could not at present make any dock or wharf on the land in question, or erect thereon any building incompatible with the reservation contained in the conveyance; but, if they could, they would not be able to let such a dock or wharf, if made, or building, if erected, and they could not use it for the purpose of profit beyond what is required for keeping up the navigation, and the purposes of their Acts. [He also cited *Lambeth Overseers* v. *London County Council* (1); *Plumstead Board of Works* v. *British Land Co.* (2)]

Beven, for the plaintiffs, in reply.

Cur. adv. vult.

July 7. COLLINS M.R. read the following judgment:—The question in this appeal is whether the respondents, the Lee Conservancy Board, are liable to pay paving rates as owners of a piece of land running along the side of the Hackney Cut, which forms a part of the Lee Navigation.

The land in question bounds and abuts upon a new street recently paved by the appellants, and the action is brought to recover from the respondents the duly assessed amount of their contribution to these expenses. The liability, if any, of the respondents arises under the joint operation of 25 & 26 Vict. c. 102, s. 77, and 18 & 19 Vict. c. 120, s. 250. By the former, "where any vestry or district board shall, under the powers given by s. 105 of the firstly recited Act" (18 & 19 Vict. c. 120), "have paved, or be about to pave, any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same"; and by the latter (that is,

(1) [1897] A. C. 625. (2) (1874–1875) L. R. 10 Q. B. 16, 203.

C. A. 1904

HACKNEY CORPORATION v. LEE CONSERVANCY BOARD.

Collins M.R.

s. 250 of 18 & 19 Vict. c. 120), the word "owner" shall mean "the person for the time being receiving the rack-rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent." Wright J. has held that the respondents are not "owners" within the meaning of the above section, inasmuch as they hold the land "as trustees for public purposes inconsistent with the land being rack-rented as between landlord and tenant."

The question is whether the conditions under which the respondents hold the land in question are such as to support the learned judge's conclusion. Mr. Beven, in his able argument for the appellants, referred to the poor-rate cases, and particularly to the leading case of *Mersey Docks Trustees* v. *Cameron*. (1) It is said that these authorities have only an indirect bearing upon the point in question. If, indeed, it could be shewn that the land was, to use Lord Watson's phrase, extra commercium, so as not to be subject to the poor-rate, it would equally excuse its owners from contribution to paving expenses. In such case they would not be deemed to be owners of land within the definition of s. 250: see the cases cited infra. But it was contended for the respondents that it would not follow that, though the conditions of its occupation were such as to ground liability to the poor-rate, its owners would be liable to the paving rate; for, though the subject of beneficial occupation, it might not be capable of being let at a rack-rent, which, as they contended, is the test of liability to the paving rate. Mr. Beven satisfied me that the occupation of the trustees of the land in question is beneficial within the meaning of the poor-rate authorities, and that the land is, therefore, not extra commercium. But, assuming the respondents' contention on this point to be well founded, it still has to be decided whether the land in question must be deemed incapable of being let at a rack-rent. The fact that it is not actually let at a rack-rent is immaterial if in given circumstances it might be let at a rack-rent: *Wright* v. *Ingle*. (2)

(1) 11 H. L. C. 443. (2) 16 Q. B. D. 379.

The incapacity, to excuse the owners, must be not temporary, but perpetual: see per A. L. Smith L.J. in delivering the judgment of the Court of Appeal in *Hornsey District Council* v. *Smith*. (1) The learned Lord Justice there said: "These two cases"—that is, *Plumstead Board of Works* v. *British Land Co.* (2) and *Great Eastern Ry. Co.* v. *Hackney Board of Works* (3)—"in our judgment shew that, if land be by statute for ever incapable of yielding a rack-rent, the owner thereof is not 'owner' within the meaning of the Acts." The passage in Lord Watson's judgment in *Great Eastern Ry. Co.* v. *Hackney Board of Works* (3) on the same point is as follows: "The authorities cited in the course of the argument appear to me to establish this proposition, that the person vested with the property of heritable subjects, which have been placed extra commercium, or are subject in perpetuity to the burden of a public right, which deprives him of their beneficial use, is not an owner of land within the meaning of the 77th section of the Act of 1862." On going through the Acts regulating the powers and duties of the trustees, as placed before us by Mr. Beven, I am by no means satisfied that they have not power to let the land in question at a rack-rent while they still retain it for the purposes of the navigation. They are certainly owners in fact, and by the Lee Navigation Act, 1850 (13 & 14 Vict. c. cix.), s. 14, they have power to construct all such new locks, docks, wharves, towing-paths, and other works as the trustees in their discretion may think proper. They could therefore utilize the land in question for any of such constructions, and there does not appear to be any statutory inhibition upon their letting them for purposes ancillary to their undertaking. But however this may be, they are empowered by their Act of 1868 (31 & 32 Vict. c. cliv.), s. 115, to sell, convey, or otherwise dispose of any lands for the time being vested in them which, in their judgment, are not required for any of the purposes of the Act. The land in question was bought by the trustees for the purpose of enabling them to strengthen the bank of the cut, but, if they chose to substitute,

(1) [1897] 1 Ch. 843, at p. 862. (2) L. R. 10 Q. B. 16, 203.
(3) 8 App. Cas. 687.

C. A. 1904

HACKNEY CORPORATION v. LEE CONSERVANCY BOARD.

Collins M.R.

as they might do, a retaining wall, they might dispose of the portion of the land no longer required. It is, however, contended by the respondents that, even if theoretically such user of the land were possible, it is at best only a fantastic and ingenious suggestion such as that which was urged with respect to the bridge parapets in *Great Eastern Ry. Co.* v. *Hackney Board of Works*. (1) It is to be remarked, however, that the point so dealt with in that case was merely as to the parapets in question, which, it was suggested, might be utilized for advertisements, but which were in fact, as pointed out by Lord Watson, imposed as a burden to be accepted by the company as a condition of carrying the road over the railway. Here we are dealing with a strip of land about twenty-six feet wide, and running a considerable length along the cut. I think that the principle "de minimis" cannot be applied to such a considerable piece of land, and it was, I think, on that principle only that Lord Blackburn assented to the view that the parapets might be treated as extra commercium. The Court below (2), following *London and North Western Ry. Co.* v. *St. Pancras* (3), had treated them as capable of grounding ownership, and their view and the decision on which it was founded were not questioned by the House of Lords, or disposed of otherwise than by the operation of the maxim "de minimis," which does not seem to me to be applicable in this case. Indeed Lord Watson expressly approved of *London and North Western Ry. Co.* v. *St. Pancras* (3) on grounds which make it directly applicable to this case. He pointed out that the wall there "was necessary for the construction of the line and the protection of traffic upon it, and, in short, formed part of the works from which the company were deriving profit." The land in question therefore is not in consimili casu with the parapets in the case of *Great Eastern Ry. Co.* v. *Hackney Board of Works* (1), and cannot be excluded from rateability on the same grounds. The result is that the nature of the undertaking itself and the conditions under which it is carried on do not place the land in question extra commercium, and, even if it be assumed that incapacity to let land

(1) 8 App. Cas. 687. (2) (1882) 9 Q. B. D. 412.
(3) 17 L. T. 654.

which is capable of beneficial occupation, and is being actually beneficially occupied, would excuse from liability to paving rates, there is no such inability in this case. Of course we are not concerned with the amount, but only with the principle of liability. On these grounds I am of opinion that this appeal must be allowed.

STIRLING L.J. read the following judgment:—In my opinion this case is not governed by the decisions in *Great Eastern Ry. Co.* v. *Hackney Board of Works* (1) and *London County Council* v. *Wandsworth Borough Council.* (2) Those cases were decided, as I understand them, on the ground that the lands there sought to be made liable for paving expenses were, in the language of A. L. Smith L.J., "by statute for ever incapable of yielding a rack-rent": *Hornsey District Council* v. *Smith.* (3) That is not so here, for the Lee Conservancy Board has (under the Lee Conservancy Act, 1868, s. 115) a power of sale which might be exercised at any moment; and, if the land were sold, it might be let at a rack-rent. The absence of any express statutory power of letting was much relied on in argument; but, even if it be assumed that the defendants have no power to let, the case is not concluded. It was pointed out in *Wright* v. *Ingle* (4) by Bowen L.J. that "s. 250 does not confine the term 'owner' to those persons who could receive a rack-rent from the particular premises, or who could let them at a rack-rent; it includes those persons who would receive the rack-rent if the premises were let at such a rent, and I think *Bowditch* v. *Wakefield Local Board* (5) is a conclusive authority, if authority were wanted, to shew that a man is not the less the 'owner' of premises because, by the provisions of the deed under which he holds them, they cannot, so long as he holds them, be let at a rack-rent." In *Wright* v. *Ingle* (6) it was decided that the trustees of a chapel who held it upon trust to permit it to be used as a place of religious worship in connection with the Wesleyan

(1) 8 App. Cas. 687.
(2) [1903] 1 K. B. 797.
(3) [1897] 1 Ch. 843, at p. 862.
(4) 16 Q. B. D. 379, at p. 402.
(5) (1871) L. R. 6 Q. B. 567.
(6) 16 Q. B. D. 379.

C. A. 1904

HACKNEY CORPORATION v. LEE CONSERVANCY BOARD.

Stirling L.J.

body, with power of sale but without power to let, were liable to contribute to paving expenses. In *London and North Western Ry. Co.* v. *St. Pancras* (1) it was held that a retaining wall of a railway cutting was land abutting on a street and liable to be charged with paving expenses. This decision was approved in *Great Eastern Ry. Co.* v. *Hackney Board of Works* (2) by Lord Watson, who says: "It is obvious that the wall was necessary for the construction of the line and the protection of traffic upon it, and, in short, formed part of the works from which the company were deriving profit." It may be observed that as a general rule a railway company possesses no power to let either the undertaking as a whole or separate portions of it: see *Mulliner* v. *Midland Ry. Co.* (3)

In the present case the piece of land in question is used as an embankment for preventing the escape of the waters of the river Lee and preserving the river in a navigable condition, so that the Conservancy Board may earn the tolls which the statutes authorize them to charge. If the navigation were managed by an incorporated company of shareholders to whom dividends were payable, the case would be undistinguishable from that of a railway company. The money necessary to enable the board to perform its statutory duties has been raised by borrowing money on mortgage, and the tolls are applicable to pay the interest on the mortgages. The mortgagees have in substance contributed the capital by which the undertaking is carried on, and, although there is no body of shareholders, and the Conservancy Board acts without reward, yet, as was pointed out by Blackburn J. in advising the House of Lords in *Mersey Docks Trustees* v. *Gibbs* (4), such a corporation is in its very nature a substitution on a large scale for individual enterprise. It was there laid down that "in the absence of anything in the statutes (which create such corporations) shewing a contrary intention in the Legislature, the true rule of construction is that the Legislature intended that the liability of corporations thus substituted for individuals

(1) 17 L. T. 654.
(2) 8 App. Cas. 687, at p. 693.
(3) (1879) 11 Ch. D. 611.
(4) L. R. 1 H. L. 93, at p. 107; 11 H. L. C. 686, at p. 707.

should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works." In the present case, so far from the statutes shewing any contrary intent, the course of legislation points in favour of the application of the rule. An early Act dealing with the Lee navigation is 7 Geo. 3, c. li., s. 84 of which provides that all sums of money to be raised or paid by virtue of the Act should be applied in the first place in discharging the expenses incurred in and in relation to the obtaining of the Act, and afterwards in paying certain annual payments thereinbefore directed to be made and in performing the contracts entered into by the trustees in pursuance thereof, and for improving, completing, and maintaining the navigation and carrying the Act and the several provisions, powers, and authorities therein contained into effectual execution, and to no other use or purpose whatever. In *Reg.* v. *Trustees of River Lee* (1), decided in 1855, it was held by the Court of Queen's Bench that the trustees were not, by reason of the negative words at the close of s. 84, exempted from payment of poor-rates, and that the section only applied to moneys remaining in their hands after paying all lawful charges, including poor-rates. Subsequently, by the Lee Conservancy Act, 1868, s. 64, it was expressly enacted that "the expenses incident to all the powers and duties under the Lee Navigation Improvement Acts shall be considered as among the purposes for which income received by the trustees under those Acts is at the passing of this Act by law applicable." The Legislature thus sanctioned by express enactment the construction placed by the Court of Queen's Bench on s. 84 of the Act of George III., and authorized its application to other cases. Both these enactments still remain in force; and it appears to me that, regard being had to them, the Lee Conservancy Board cannot claim exemption from the incidents of ownership of land acquired for the purposes of the undertaking, and that the paving expenses now in question are authorized and ought to be paid by the board. The appeal ought therefore to be allowed.

(1) 19 J. P. 310.

C. A.
1904
HACKNEY CORPORATION v. LEE CONSERVANCY BOARD.

MATHEW L.J. read the following judgment:—I agree. The undertaking managed by the defendants is in its nature commercial and capable of beneficial use. Its character in this respect is not altered by reason of the statutory provisions which were intended to limit the receipts from the property of the defendants to the amount of the outgoings, so as to render the business carried on by them self-supporting. It was not disputed that the whole undertaking and each part of the property held by the defendants were rateable. The land in question had been acquired upon terms which shewed that it was considered capable of being profitably employed. It might have been purchased or taken on lease. In either case I cannot agree that the land in the possession of the defendants ceased to be of any value. But, as was pointed out, the question is not whether the embankment was rateable, but whether the defendants were "owners" within the definition in the Metropolis Management Act, 1855, s. 250. There seems to me to be sufficient evidence to shew that the embankment without impairing its efficiency as a protection to adjoining lands might be made the site of a building or might in other ways be turned to profitable account in connection with the defendants' business. The defendants' liability for paving expenses seems to me to be analogous to the obligation of a railway company, or of a waterworks company under the Waterworks Clauses Act. I am unable to agree with the reasoning of my brother Wright, and am of opinion that the appeal should be allowed.

Appeal allowed.

Solicitor for plaintiffs: *W. A. Williams.*
Solicitors for defendants: *Clapham, Fitch & Co.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1904
July 11.

LOMAS *v.* GRAVES & CO.

Stock Exchange—Defaulter—Official Assignee—Assignment of Assets—Rules of Stock Exchange—Money paid into Court—Judgment—Charging Order.

The rules of the Stock Exchange operate to effect an assignment of all the assets of a member of the Stock Exchange declared a defaulter to the official assignee of the Stock Exchange; and that assignment, unless invalidated in bankruptcy proceedings against the defaulter, is valid as against persons who are not, as well as those who are, members of the Stock Exchange.

Richardson v. *Stormont, Todd & Co.*, [1900] 1 Q. B. 701, followed.

APPEAL against an order made by Bucknill J. at chambers as after mentioned.

The plaintiff had in May in the present year commenced an action against the defendants for money lent, and had on June 10 recovered judgment in the action for the amount claimed. The plaintiff was not a member of the Stock Exchange, and the loan by him had no connection with Stock Exchange transactions. Previously to the commencement of that action, namely, in July, 1903, the defendants, who were members of the Stock Exchange, had been declared defaulters on the Stock Exchange. An action had been commenced early in 1904, in which Graves & Co., the defendants in the first-mentioned action, were plaintiffs, against one Ashby, a client of the defendants, for moneys alleged to be due from him to them in respect of transactions on the Stock Exchange. By the rules of the Stock Exchange (rules 176–183), upon a member being declared a defaulter the official assignee of the Stock Exchange is to collect his assets, and distribute them among the members of the Stock Exchange who are creditors of the defaulter.

It appeared that the action against Ashby was brought by the official assignee of the Stock Exchange in the name of the defendants in the course of his duty in collecting the assets of the defendants as defaulters under the rules of the Stock

C. A. 1904

LOMAS v. GRAVES & Co.

Exchange. In that action Ashby pleaded a set-off and counter-claim as to part of the amount claimed, and as to the balance admitted liability and paid money into court in satisfaction thereof a few days before judgment was recovered against the defendants by the plaintiff. The sum so paid in still remaining in court, the plaintiff obtained an order nisi charging the defendants' interest in it with the amount payable on the judgment recovered by him. The official assignee claimed the money, and, on application to make the order nisi absolute, Bucknill J., on the authority of *Richardson* v. *Stormont, Todd & Co.* (1), refused to do so, and discharged the order nisi.

J. E. Bankes, K.C., and *Ernest Pollock*, for the plaintiff. The plaintiff is entitled to have the charging order made absolute. The case of *Richardson* v. *Stormont, Todd & Co.* (1) is distinguishable. In that case it appears from the judgment of Mathew J. in the Court below that the defendants knew that they were dealing with the defaulter as agent for the official assignee of the Stock Exchange under the rules, and on the footing that the shares purchased were to be paid for in full. Messrs. Stormont and Todd had been members of the Stock Exchange themselves, and were familiar with the rules; and, under the peculiar circumstances of the case, they were really in the same position as regards being bound by the rules as if they had been members of the Stock Exchange. This appears really to have been the ground of the decision from the judgments in the Court of Appeal. The case no doubt decided that as regards members of the Stock Exchange inter se and the defendants, who under the peculiar circumstances were in the same position, the term "assets" in the Stock Exchange rules on the subject was not confined to what may be called the Stock Exchange assets of the defaulter, but included all his assets. But the case does not really decide that the rules of the Stock Exchange as to defaulters' assets have the effect of binding members of the outside public, such as the plaintiff here was, who know nothing of the rules and have not contracted with reference to them. The cases of *Levitt* v.

(1) [1900] 1 Q. B. 701.

Hamblet (1) and *Ratcliff* v. *Mendelssohn* (2) shew that the rules of the Stock Exchange do not bind outsiders unless they have contracted with reference to them. There is no actual assignment of the defaulter's assets in such cases. The only effect of the rules is that each member agrees with his brother members that, if he should be declared a defaulter, he will allow the official assignee to collect his assets in accordance with the rules, and will assist him in so doing. In this case, if the money had been paid out of court, the defendants might have been bound to account for it to the official assignee of the Stock Exchange; but it remains under the control of the Court, and it is submitted that nothing has occurred to deprive the plaintiff of his right to a charging order upon it.

[They also cited *Tomkins* v. *Saffery* (3); *Ex parte Grant, In re Plumbly* (4); *King* v. *Hutton*. (5)]

J. R. Atkin, for the defendants and the official assignee of the Stock Exchange, was not called upon to argue.

COLLINS M.R. I think this appeal fails. In this case the plaintiff, on June 10 in this year, recovered judgment in an action against the defendants, who were members of the Stock Exchange. The defendants had themselves previously brought an action against one Ashby in respect of a balance due upon Stock Exchange transactions, in which action a sum of money had been paid into court by Ashby. The question is whether the plaintiff is entitled to an order charging the sum of money so paid into court with the amount of the judgment recovered by him against the defendants, having regard to the fact that in July, 1903, the defendants had been declared defaulters upon the Stock Exchange. That question depends upon whether, under the circumstances, the claim of the plaintiff is paramount to that of the official assignee of the Stock Exchange, whose duty it is by the rules to collect the assets of members declared defaulters, and distribute them among their creditors on the Stock Exchange. The result of the authorities is, as it

(1) [1901] 2 K. B. 53.
(2) [1902] 2 K. B. 653.
(3) (1877) 3 App. Cas. 213.
(4) (1880) 13 Ch. D. 667.
(5) [1899] 2 Q. B. 555.

C. A. 1904

LOMAS v. GRAVES & Co.

Collins M.R.

appears to me, to shew that the operation of the Stock Exchange rules on this subject is to effect an assignment of all the assets of the defaulter to the official assignee of the Stock Exchange; and, that being so, as long as that assignment stands good, no other person can be entitled to the benefit of those assets. The money paid into court in the action by the defendants against Ashby is part of the defendants' assets; and, if the question of the title to that money were tested by an interpleader issue as between the plaintiff as judgment creditor and the official assignee of the Stock Exchange, it appears to me clear, on the authorities, that the title of the latter must necessarily be held paramount to any right of the former, inasmuch as it came into existence previously in point of time. The judgment creditor cannot be entitled to have a charging order upon that which has been previously assigned to another person. Certain decisions have been cited for the plaintiff, as shewing that, though the rules of the Stock Exchange are no doubt binding on members of the Stock Exchange as being a domestic arrangement made between themselves, they do not for all purposes bind the outside public. This proposition is no doubt true as applied in the particular cases to which those decisions referred; but that does not in the least affect the general principle laid down by the authorities to which I have alluded, to the effect that there is under the Stock Exchange rules an assignment of all the defaulter's assets to the official assignee, which is valid except so far as it may be impeachable in the event of bankruptcy proceedings being subsequently taken against the defaulter. For instance, one of the cases upon which the plaintiff's counsel relied, namely, *Levitt* v. *Hamblet* (1), was a case in which, a broker having been declared a defaulter on the Stock Exchange, a contract which he had made with jobbers on the Stock Exchange was under the rules closed at a price ascertained on a day which was not the day fixed for performance by the contract; and it was contended that the liability of the undisclosed principal of the broker outside the Stock Exchange was thereby discharged; but it was held that this was not so, and that the right of the

(1) [1901] 2 K. B. 53.

jobbers as against the client of the broker was not affected by the domestic arrangement made by the members of the Stock Exchange for settling their claims and liabilities as between themselves. It does not appear to me that cases of that kind in any way impeach the general principle laid down by the authorities to which I have referred with regard to the effect of the rules in bringing about an assignment of a defaulter's assets to the official assignee of the Stock Exchange. For these reasons I think that the decision of the learned judge was correct and the appeal must be dismissed.

STIRLING L.J. I am of the same opinion.

It appears that in July, 1903, the defendants' firm were declared defaulters on the Stock Exchange, the effect being that the rule of the Stock Exchange came into operation by which it is made the duty of the official assignee to collect the assets of a defaulter and distribute them among his creditors on the Stock Exchange. The meaning of that rule has been the subject of consideration by the Courts in several cases, and particularly by the House of Lords in *Tomkins* v. *Saffery* (1) and the Court of Appeal in *Richardson* v. *Stormont, Todd & Co.* (2) The interpretation placed upon the rule in those cases appears to be that the word "assets" therein means all the assets of the defaulter, and that these are made applicable by the official assignee for the benefit of the defaulter's creditors on the Stock Exchange. This provision of the rule is one of the terms upon which the member agrees to become, and is admitted to be, a member of the Stock Exchange; and, so long as it does not conflict with the law of the land, it is valid. In certain events it may conflict with that law; for it may bring about what has been called a cessio bonorum, that is to say, an assignment of all the goods of the defaulter to the official assignee of the Stock Exchange, in trust for a particular class of creditors; and in the case of *Tomkins* v. *Saffery* (1), in which bankruptcy proceedings were subsequently taken against the defaulter, it was held that such an assignment amounted to an undue preference of creditors, and was bad as being an

(1) 3 App. Cas. 213. (2) [1900] 1 Q. B. 701.

C. A. 1904

LOMAS v. GRAVES & CO.

Stirling L.J.

act of bankruptcy. No steps have been taken in the present case to procure an adjudication of bankruptcy against the defendants, and, in the absence of such an adjudication, the assignment to the official assignee of the Stock Exchange under the rules remains valid. In *Richardson* v. *Stormont, Todd & Co.* (1) it was held that the effect of the Stock Exchange rules on the subject had been to create an equitable assignment to the official assignee of the assets of the defaulter. Such an assignment likewise appears to have resulted in the present case from the operation of the Stock Exchange rules as regards the money here in question. The official assignee discovered among the assets of the defendants a debt due to them from one Ashby, against whom he brought an action in the name of the defendants' firm to recover that debt, in which action he succeeded in getting money paid into court. The plaintiff commenced his action against the defendants in May, 1904, and recovered judgment on June 10. At that time the money in question had been paid into court, and the plaintiff applied for an order charging it with the amount of his judgment. To this application the answer was made that Graves & Co. were merely nominal plaintiffs in the action against Ashby, the real plaintiff who was entitled to the money paid into court being the official assignee of the Stock Exchange. The learned judge held, as it seems to me correctly, that, on the authority of *Richardson* v. *Stormont, Todd & Co.* (1), the answer so made to the application of the plaintiff was a good one.

Appeal dismissed.

Solicitors for plaintiff: *Soames, Edwards & Jones.*

Solicitors for defendants: *Travers-Smith, Braithwaite & Robinson.*

E. L.

(1) [1900] 1 Q. B. 701.

[IN THE COURT OF APPEAL.]

C. A.
1904
March 29.

BUSHELL *v.* HAMMOND AND OTHERS.

Licensing Acts—Licence—Renewal—Order of Licensing Justices for Structural Alterations—"Part of the Premises where Intoxicating Liquor is sold or consumed"—Jurisdiction—Licensing Act, 1902 (2 *Edw.* 7, *c.* 28), *s.* 11, *sub-s.* 4.

By s. 11, sub-s. 4, of the Licensing Act, 1902, licensing justices, on renewing a licence, may by order direct that, within a time fixed by the order, such alterations as they think reasonably necessary to secure the proper conduct of the business shall be made in "that part of the premises where intoxicating liquor is sold or consumed":—

Held, that under this sub-section licensing justices had jurisdiction, upon granting an application for renewal, to make an order that the back entrance to the licensed premises should be closed and kept locked, and that the passage leading from the back entrance to the bars where intoxicating liquor was sold and consumed should be closed, their power including the right to decide what alteration in the means of access was reasonably necessary to the proper conduct of the business.

APPEAL from a decision of the Divisional Court upon a case stated by the East Kent Quarter Sessions on the hearing of an appeal against an order made by licensing justices.

The appellant was the tenant of a fully licensed public-house at Ramsgate. At the general annual licensing meeting in February, 1903, the appellant applied for a renewal of his licence; the licensing justices required him to produce a plan of the premises under s. 11, sub-s. 4, of the Licensing Act, 1902, and adjourned the application to the adjourned licensing meeting in March. At the adjourned licensing meeting the licensing justices granted their certificate for the renewal of the licence, but made a separate order on the appellant by which they ordered that the back entrance to the premises should be closed by an iron gate, which should be kept locked and should be opened only at necessary times for the delivery of beer, coals, or other goods; that a passage by which access could be obtained to the bars inside the house should be closed, and a direction on a lamp to the effect that the passage led to the bars should be obliterated. It was proved before the licensing

C. A. 1904

BUSHELL v. HAMMOND.

justices that intoxicating liquors were sold in the bar, the bar parlour, and the club room, but that none were sold near the back entrance or in the passage leading to it. No evidence was given that intoxicating liquors were ever consumed in the passage, but it was admitted that there was nothing to prevent their consumption in that part of the premises, and that the back entrance and passage were in fact used by customers entering or leaving the house. It was further proved that the existence of the back entrance entailed extra work upon the police in the exercise of the necessary supervision over the conduct of the business.

The appellant contended that the licensing justices had no jurisdiction to make the order, upon the ground that the alteration directed to be carried out was not an alteration in that part of the premises where intoxicating liquor was sold or consumed within the meaning of s. 11, sub-s. 4, of the Licensing Act, 1902. The Court of quarter sessions held that the licensing justices had jurisdiction to make the order.

The question for the opinion of the Court was whether the justices had jurisdiction to make the order.

The Divisional Court (Lord Alverstone C.J., Wills and Channell JJ.) held that the justices acted within their jurisdiction, and dismissed the appeal. The licensee appealed. (1)

(1) By 2 Edw. 7, c. 28 (The Licensing Act, 1902), s. 11, sub-s. 2, "Any alteration in any licensed premises for the sale by retail of intoxicating liquors to be consumed thereon, which gives increased facilities for drinking, or conceals from observation any part of the premises used for drinking, or which affects the communication between the part of the premises where intoxicating liquor is sold and any other part of the premises, or any street or other public way, shall not be made without the consent of the licensing justices, ... and, if any such alteration is made, save under the order of some lawful authority, without such consent as aforesaid, a Court of summary jurisdiction, on complaint, may by order declare the licence to be forfeited, or direct that, within a time fixed by the order, the premises shall be restored to their original condition."

By sub-s. 4, "On any application for the renewal of a licence for the sale by retail of intoxicating liquors to be consumed on the premises, the licensing justices may require a plan of the premises to be produced before them, and to be deposited with their clerk, and, on renewing any such licence, they may by order direct that, within a time fixed by the order, such alterations as they think reasonably necessary to secure the proper

J. E. Bankes, K.C., and *G. F. Hohler*, for the appellant. The licensing justices had no jurisdiction under s. 11, sub-s. 4, of the Licensing Act, 1902, to make the order appealed against. The order is not an order as to that part of the premises where intoxicating liquor is sold or consumed, for the back door is not situated in that part of the premises.

[ROMER L.J. If intoxicating liquor were sold or consumed in a room on the first floor, would the licensing justices have jurisdiction to make an order under this sub-section as to the staircase leading to it?]

Yes.

[ROMER L.J. I cannot see any real difference between a horizontal approach by a passage and a vertical approach by a staircase.]

The alteration ordered is not a structural alteration in that part of the premises where intoxicating liquor is sold or consumed, but in another part of the premises which affects that part where the sale or consumption takes place. The justices have in effect held that the sub-section applies to any part of the premises where intoxicating liquor is capable of being sold or consumed, which must be wrong, for it would include the living and sleeping rooms of the licensee's family, and they have ignored the distinction between sub-s. 2, which forbids unauthorized alterations by the licensee in any part of the licensed premises which may have certain specified effects, and sub-s. 4, which gives the licensing justices power to order alterations in that part of the premises devoted to the sale and consumption of liquor.

Dickens, K.C., and *Weigall*, for the respondents, the licensing justices, were not called upon.

COLLINS M.R. I am of opinion that this appeal should be dismissed. The point raised upon the case stated by quarter sessions is whether the licensing justices had jurisdiction to

conduct of the business shall be made in that part of the premises where intoxicating liquor is sold or consumed If the licensed person makes default in complying with any such order, he shall, on summary conviction, be liable to a fine"

C. A. 1904

BUSHELL v. HAMMOND.

Collins M.R.

order certain structural alterations to be made in licensed premises: that question depends upon the meaning to be attached to the provisions of s. 11, sub-s. 4, of the Licensing Act, 1902. The facts are shortly these. Application was made in the ordinary course to licensing justices for the renewal of a licence, and under that Act licensing justices have power to require, as they did in this case require, plans of the premises to be deposited with them. Plans were accordingly deposited by the applicant, which shewed that there was a means of access to the part of the premises where intoxicating liquor was sold from a back street through an open passage; the main entrance to that part of the premises was in the main street, but there was also undoubtedly a means of access through the back door. The licensing justices made an order involving the least possible disturbance to the premises and inconvenience to the applicant; they required the licensee not to allow the back entrance to be used as a means of access for customers, and for that purpose ordered him to keep the door locked and leave the key in the custody of a member of his family, instead of requiring more drastic alterations to be made in the premises at considerable expense to the licensee. It is said that that order was made by the licensing justices without jurisdiction.

Now s. 11, sub-s. 4, which deals with the renewal of licences for the sale of intoxicating liquors to be consumed on the premises, provides that the licensing justices may require the production of a plan of the premises, "and, on renewing any such licence, may by order direct that, within a time fixed by the order, such alterations as they think reasonably necessary to secure the proper conduct of the business shall be made in that part of the premises where intoxicating liquor is sold or consumed"; the sub-section then gives an appeal to quarter sessions against the order, and imposes a penalty in default of compliance. In the present case the licensing justices made the order appealed from, thinking the alteration reasonably necessary to secure the proper conduct of the business; and upon the appeal to quarter sessions the Court held that the order was in itself reasonable, if there was power to make it, a

majority being of opinion that it was within the jurisdiction of the licensing justices; and the Divisional Court affirmed their decision.

In order to understand sub-s. 4, we must look at the whole of the section of which it forms a part, and some help will be derived from the side-note (though of course it is not part of the statute), which shews that the section is dealing with the control of justices over the structure of licensed premises. Sub-s. 1 deals with applications for new licences, and under it an applicant is bound to deposit a plan of the premises with the clerk to the licensing justices twenty-one days before the annual licensing meeting. Then comes sub-s. 2, upon which reliance has been placed by the appellant, but which is really in favour of the view taken by the licensing justices. Put shortly, it provides that any alteration which (inter alia) affects the communication between the part of the premises where intoxicating liquor is sold and any other part of the premises or any street or other public way is not to be made without the consent of the licensing justices, who, before giving their consent, may require the deposit of plans of the proposed alterations; and where such an alteration is made without consent, except under the order of some lawful authority, a Court of summary jurisdiction may forfeit the licence or order the premises to be restored to their original condition. Sub-s. 3 is immaterial to the present case, and sub-s. 4 I have already referred to.

I think that, in order to arrive at a clear view of the intention of the Legislature, sub-ss. 2 and 4 must be read together. The section is dealing with two states of things: first, in sub-s. 2, with premises already licensed, in which certain structural alterations are not to be made without the necessary consent; and, secondly, in sub-s. 4, with applications for renewals, power being given to the licensing justices, when renewing a licence, to order certain structural alterations in parts of the licensed premises. Sub-s. 2 shews clearly what alterations in licensed premises will not be tolerated during the currency of the licence unless they are made with the consent of the licensing justices, and one of them is an alteration which

C. A. 1904

BUSHELL v. HAMMOND.

Collins M.R.

would bring about the very state of things existing in the present case, that is, an alteration "which affects the communication between the part of the premises where intoxicating liquor is sold and any other part of the premises or any street or other public way"; it is clear that the premises of the appellant come within the mischief which the Legislature desired to prevent. Although the phraseology used is not very exact, one fixed purpose runs through these sub-sections—namely, the exercise by licensing justices of a control over the structure of licensed premises; and this control may be exercised in two ways—first, by the giving or withholding of their consent to structural alterations during the currency of a licence; and, secondly, by an order to carry out structural alterations made upon an application for renewal of a licence, and in a sense, though not as a matter of law, as a condition of the renewal of the licence. Reasonably interpreted, I think that the language of sub-s. 4 covers what has been done in the present case by the licensing justices. The sub-section gives power to order that such alterations as they think "reasonably necessary to secure the proper conduct of the business shall be made in that part of the premises where intoxicating liquor is sold or consumed," and one of the alterations ordered in the present case is to secure that the means of access shall be such as is reasonably necessary and no more. In sub-s. 2 the means of access to the part of the premises where intoxicating liquor is sold is dealt with, and no alteration in that means of access can be made during the currency of a licence without the consent of the licensing justices; and I think that under sub-s. 4 the licensing justices, when determining the nature of the structural alterations which they shall require upon the renewing of a particular licence, are quite justified in taking into consideration the means of access to the part where intoxicating liquor is sold, and in deciding what alteration in the means of access is reasonably necessary to the proper conduct of the business. I think, therefore, that the licensing justices were clearly acting within their jurisdiction in ordering an alteration of the means of access to these premises, and that the judgment of the Divisional Court must be affirmed.

ROMER L.J. I entirely agree with the judgments of my Lord and of the Divisional Court.

MATHEW L.J. I concur. The construction which the appellant seeks to put upon sub-s. 4 would nullify in great measure its usefulness. He must contend that, if the means of access to that part of licensed premises where intoxicating liquor is sold were by steep steps or along a dark narrow passage, there could be no interference with such a state of things on the part of the licensing justices. This would reduce the operation of the sub-section to a mere power to order an alteration in the ambit of the premises where intoxicating liquor is sold and where drinking goes on, and would give no effect to what seems to me to be the plain intention of the Legislature. If there is any ambiguity about the later sub-sections—and for my own part I confess that I think there is—it is cleared up on reference to the earlier one. In my opinion this order was entirely within the jurisdiction of the licensing justices.

Appeal dismissed.

Solicitors for appellant: *Speechly, Mumford & Craig, for E. Wotton, Ramsgate.*

Solicitors for respondents: *Kingsford, Dorman & Co., for A. B. Burrows, Ramsgate.*

W. J. B.

1904
May 13.

THE KING *v.* THE RECORDER OF BATH.

Licensing Acts—Practice—Appeal — Order for Structural Alterations in Licensed Premises made by Licensing Justices for Borough—Jurisdiction of Recorder—Licensing Act, 1902 (2 *Edw.* 7, *c.* 28), *s.* 11, *sub-s.* 4—*Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 27.

An appeal from an order of licensing justices for a city or borough having a separate Court of quarter sessions made under s. 11, sub-s. 4, of the Licensing Act, 1902, by which, on renewing a licence, the licensing justices direct certain structural alterations to be made in that part of the premises where intoxicating liquor is sold or consumed, lies to the recorder of the city or borough :—

So *held*, by Lord Alverstone C.J. and Wills J., Kennedy J. dissenting.

RULE NISI calling upon the Recorder of Bath to shew cause why a writ of mandamus should not issue commanding him to hear and determine the appeal of one McCoombe against an order of the licensing justices for the city of Bath.

From the affidavits it appeared that McCoombe was the owner and also the licensee of a fully licensed public-house, and that at the general annual licensing meeting, held on February 11, 1904, he applied to the licensing justices for a renewal of his licence; the licensing justices required him to produce a plan of the premises under s. 11, sub-s. 4, of the Licensing Act, 1902, and adjourned the application. At the adjourned sessions the licensing justices renewed the licence, but made a separate order by which they directed that a door at the back of the premises should be kept closed, and that the doorway and the passage leading from it in the direction of the bar should not be used by customers. The licensee appealed against this order to the quarter sessions for the city of Bath, but the recorder refused to hear the appeal on the ground that he had no jurisdiction to do so, and that an appeal from the licensing justices lay only to the quarter sessions for the county. The present rule for a mandamus was then obtained. (1)

(1) By 2 Edw. 7, c. 28 (The Licensing Act, 1902), s. 11, sub-s. 4, "On any application for the renewal of a licence for the sale by retail of intoxicating liquors to be consumed on the premises, the licensing justices may

J. A. Simon, for the recorder, shewed cause. The appeal is given to any aggrieved person by s. 27 of the Alehouse Act, 1828, and the authorities shew that previous to the Licensing Act, 1902, no appeal against a decision of licensing justices upon an application to grant or renew a licence lay to the recorder of a borough; the order in the present case is a mere incident of such an application, and the recorder equally has no jurisdiction to hear the appeal. In *Reg.* v. *Deane* (1) it was held that under s. 27 of the Act of 1828 the appeal against a refusal to grant a new licence (as to which there was an appeal prior to the Licensing Act, 1872) lay to the county justices in quarter sessions, and that in boroughs having a separate Court of quarter sessions the power to hear such an appeal was withheld from the recorder by virtue of s. 105 of the Municipal Corporations Act, 1835 (the provisions of which are re-enacted in s. 165 of the Municipal Corporations Act, 1882). In *Reg.* v. *Cockburn* (2) it was held that the same section operated to disqualify the recorder of a municipal borough from hearing an appeal against a refusal to grant a

require a plan of the premises to be produced before them and to be deposited with their clerk, and, on renewing any such licence, they may by order direct that, within a time fixed by the order, such alterations as they think reasonably necessary to secure the proper conduct of the business shall be made in that part of the premises where intoxicating liquor is sold or consumed, but any such order shall be subject to an appeal to a Court of quarter sessions, as provided by the Alehouse Act, 1828. If the licensed person makes default in complying with any such order, he shall, on summary conviction, be liable to a fine."

By 9 Geo. 4, c. 61 (The Alehouse Act, 1828), s. 27, "Any person who shall think himself aggrieved by any act of any justice, done in or concerning the execution of this Act, may appeal against such act to the next general or quarter sessions of the peace holden for the county or place wherein the cause of such complaint shall have arisen." This section is preserved so far as it relates to the renewal and transfer of licences by Sched. II. of the Licensing Act, 1872 (35 & 36 Vict. c. 94).

By 45 & 46 Vict. c. 50 (The Municipal Corporations Act, 1882), s. 165, sub-s. 4 (*c*), "The recorder shall not, by virtue of his office, have power to grant any licence or authority to any person to keep an inn, alehouse, or victualling house to sell excisable liquors by retail."

(1) (1841) 2 Q. B. 96.

(2) (1854) 4 E. & B. 265; S.C. 24 L. J. (M.C.) 43, sub nom. *Reg.* v. *Recorder of Bristol.*

1904

REX v. BATH (RECORDER OF).

licence for keeping an inn, the governing reason of the decision being that, if the recorder reversed the refusal of licensing justices to grant a licence, he would himself be granting a licence, which he was prohibited from doing by s. 105. The Licensing Act of 1902 is, by s. 34, to be construed with the Act of 1872, which provided for the retention of the machinery of appeals given in s. 27 of the Act of 1828 so far as related to renewal or transfer of licences. It could not have been intended by s. 11, sub-s. 4, of the Act of 1902 to give for the first time an entirely new right of appeal to the recorder from the licensing justices. In substance the order in the present case was a condition attached to the renewal. As to the effect of such an order, there is slight incidental authority in *Bushell* v. *Hammond*. (1)

Foote, K.C. (*Douglas Metcalfe* with him), for the appellant, in support of the rule. An appeal lies to the recorder against such an order as that made by the licensing justices. It is a substantive order, and not merely a condition of the renewal of the licence, at any rate not in the sense of its being a condition known to the law. The test to apply is to see what would be the result of non-compliance by the licensee with the order to close the door; he clearly could not be prosecuted in such a case for selling intoxicating liquors without a licence, for he has a licence in the ordinary form, which is a distinct document. Under s. 11, sub-s. 4, which gives the licensing justices power to make an order as to structural alterations, non-compliance with the order is punishable on summary conviction with a penalty of 20*s*. a day, and against such an order the appeal, which is to be as provided by the Alehouse Act, 1828, lies to the recorder. *Bushell* v. *Hammond* (1) has no bearing on the present case.

[LORD ALVERSTONE C.J. We have sent for the papers in *Bushell* v. *Hammond* (1), and they shew that the order as to structural alterations was a separate order to the licensee, and did not affect the renewal of the licence.]

The words "on renewing any such licence" in s. 11,

(1) Ante, p. 563.

sub-s. 4, merely indicate the time and occasion on which an order for structural alterations may be made.

KENNEDY J. I have the misfortune to be unable to take the view which has been very clearly put to us by counsel in support of the rule, and will shortly give my reasons for thinking that it should be discharged. Since the passing of the Municipal Corporations Act, 1835, recorders have not dealt with the discretionary questions which arise when a licence is granted or refused, and all the appeals have gone to quarter sessions of the county. The system controlled by licensing justices is, as has before been pointed out, largely administrative; and although no doubt recorders do deal with cases affecting licensed premises so far as a breach of the law is involved, yet s. 11, sub-s. 4, deals with an appeal not regarding a breach of the law, but with an appeal which is really in regard to the licence itself, because it is an appeal as to the propriety of a condition of its grant or renewal. There may be a practice among licensing justices, when they are directing alterations to be made in licensed premises for the proper conduct of the business, to embody their directions in a separate order, but I see nothing to compel them to do so, or to prevent them from embodying their directions in their order, or certificate, for renewal. And in so far as the alterations which they can direct are limited to those which they may think reasonably necessary for the proper conduct of the business, an appeal must be grounded on a contention that the alterations directed to be made are not reasonably necessary, and the appellate tribunal must have evidence before it on the strictly administrative question of the proper conduct of the business. I think that after a period of more than sixty years I ought to be slow to hold that it has been the intention of Parliament by this Act to reverse the policy of legislation affecting the conduct of licensing business which has been followed during that period, or to hold that into this section there has slipped per incuriam an appeal to the jurisdiction of the recorder. In my opinion it cannot be that, because the licensing justices make two separate orders, there should be a

1904

REX v. BATH (RECORDER OF).

Kennedy J.

procedure of appeal which would not exist if the two orders were embodied in one document; I can see nothing to shew that the Legislature meant that there should be more than one order, and I do not think that we should read into the section that which is not there. It is no doubt true that this order was not, in form, made as a condition of granting or renewing the licence, but in effect there was a granting or renewal of the licence on terms. No doubt at the next annual licensing sessions the licensing justices would refuse a renewal of the licence if the directions as to alterations had not been carried out. I cannot bring myself to think that we ought, unless compelled by Act of Parliament, to reverse the long-established policy by which appeals on the administrative questions in licensing cases go to the quarter sessions of the county and not to the recorder, and I do not think we are compelled to do so by this particular sub-section, which speaks only of an appeal to "a" Court of quarter sessions. The Alehouse Act, 1828, contemplates (inter alia) an appeal to the quarter sessions of a county. I think therefore, though with diffidence owing to the contrary opinion of my Lord and Wills J., that this rule should be discharged.

WILLS J. I have come to the conclusion that the words "on renewing any such licence" in s. 11, sub-s. 4, indicate the time when, and occasion on which, an order is made by licensing justices under the sub-section. It seems clear tha the justices' certificate, which is preliminary to the granting o the licence by the excise authorities, has never been describe or treated as an order, but it is suggested that the joint effect of the certificate and of an accompanying order under the sub-section is equivalent to a conditional renewal of the licence. I do not think the question admits of much argument; it depends upon how it strikes the individual mind. I have been much struck by a great deal of what my brother Kennedy has just said in his judgment, but I cannot help thinking his remarks are directed rather to the policy of the law than to the construction of the Act, and that, if his view is right, the language of the section would have been different. At the

passing of the Licensing Act, 1902, it was a common thing for licensing justices to grant their certificate for the renewal of a licence upon an undertaking by the applicant, upon which they had indeed no right to insist, but which was nevertheless effective because the applicant knew that, if his undertaking were not carried out, he ran a very serious risk of a renewal being refused next year. It was felt that it was not convenient that a liability to make structural alterations should be created and enforced in this indirect way, and s. 11, sub-s. 4, substituted for it a power in the justices to make an order as to structural alterations enforceable by penalties in the event of disobedience. The sub-section says that the order is to be subject to an appeal to a Court of quarter sessions as provided by the Alehouse Act, 1828, under s. 27 of which statute a person aggrieved may appeal to the quarter sessions for the county or place where the cause of complaint arose, and it seems evident that this provision, standing alone, would give an appeal in this case to the recorder. I do not think that the case before us is affected by s. 165 of the Municipal Corporations Act, 1882, which says that the recorder is not to have power (inter alia) to grant any licence or authority to any person to keep an inn, alehouse, or victualling house to sell excisable liquors by retail, for a successful appeal under s. 11, sub-s. 4, of the Act of 1902 to the recorder would not confer upon him any such jurisdiction as that contemplated by that section; the licence, or certificate, is severable from the order as to the structural alterations, and the licence would not fall or lapse in consequence of the licensee's non-compliance with the order; it could not be contended that, as a result of his non-compliance, the publican could be convicted of selling intoxicating liquors on unlicensed premises. I think, therefore, that the rule for a mandamus to the recorder should be made absolute.

LORD ALVERSTONE C.J. In view of the difference of opinion among my learned brethren, I need hardly say that I have arrived at my conclusion upon this point with very great doubt. At first I was much struck by the argument on behalf of the

1904

REX v. BATH (RECORDER OF).

Lord Alverstone C.J.

justices, but Mr. Foote has convinced me that in one respect it fails to cover this case. If I thought that s. 11, sub-s. 4, provided for the grant of a licence on terms or for the renewal of a licence sub modo, I should have concurred in the view expressed by my brother Kennedy that the appeal lay to the quarter sessions of the county. But on looking at the language of this sub-section, at the remedy given by it, and at previous legislation on the subject, it seems to me clear that in using the words "on renewing any such licence" the Legislature only intended to point to the time at which the order might be made, and did not intend to make the order for structural alterations a term or condition of the renewal of the licence. This view seems to be aided by the form of the licence, which is given at p. 627 of Bruce Williamson on Licensing. As I understand the facts of the present case, on February 29 the licensing justices issued their certificate for renewal, which justified the issue of the actual licence by the Excise authorities; we may use popular language, and say that the licensing justices ordered the renewal; it makes no difference to the present case which form of language is employed. That being so, it seems to me impossible to say afterwards that that licence was merely a conditional licence. If the result of the recorder's decision on appeal would, or might, affect the status of the licence-holder, the argument of Mr. Simon would be unanswerable; but that would not in my judgment be the consequence of an appeal under sub-s. 4, which sub-section, in my opinion, does not contemplate a conditional renewal, but contemplates rather the making of an order, the carrying out of which may or must take up more or less time. I doubt whether s. 27 of the Alehouse Act, 1828, did, as my brother Kennedy thinks, in such a case as the present give an appeal to the justices in quarter sessions. I wish to observe, as my brother Wills pointed out, that the prohibition to the recorder contained in s. 165 of the Municipal Corporations Act, 1882, is not a prohibition against his doing anything with regard to the actual premises, but against dealing with the licence itself. Then there is the further point—that by s. 11, sub-s. 4, the

appeal is to be as provided by the Alehouse Act, 1828, and a penalty not exceeding 20*s.* a day is affixed to non-compliance with the order as to alterations; the language used by the Legislature, therefore, has taken these proceedings out of the category of a conditional renewal, the remedy for disobedience being the infliction of a penalty and not the loss of the licence. I think, therefore, that the Legislature has in terms given a distinct remedy for the breach of such an order which prevents the order being treated as a term or condition of the licence. For these reasons I think that the appeal lies to the recorder, and that this rule for a mandamus must be made absolute.

Rule absolute.

Solicitors for recorder: *Gribble, Oddie, Sinclair & Johnson, for E. W. Fuller, Bath.*

Solicitors for appellant: *Woodcock, Ryland & Parker, for J. Wall, Bath.*

W. J. B.

1904
May 10, 11.

GOLDSTEIN *v.* HOLLINGSWORTH AND OTHERS.

Factory Acts—Landlord and Tenant—Lease—Covenant by Lessees to pay and discharge "Impositions and Outgoings" — Underground Bakehouse — Structural Alterations required by District Council—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 101, *sub-ss.* 2, 8.

By s. 101 of the Factory and Workshop Act, 1901, an underground bakehouse must be certified by the district council to be suitable for the purpose, and if premises are let as a bakehouse, and the certificate can only be obtained on structural alterations being made, a Court of summary jurisdiction may make such order concerning the expenses or their apportionment between the owner and occupier as appears just and equitable under the circumstances, regard being had to the terms of any contract between the parties.

The lease of premises used as a bakehouse contained a covenant by the lessee to pay "all existing and future impositions and outgoings of every description for the time being payable either by landlord or tenant in respect of the premises." In order to obtain the certificate of the district council for the use of the premises as an underground bakehouse the expenditure of a considerable sum upon structural alterations was requisite:—

Held, that the expenditure came within the expression "impositions and outgoings" in the lessee's covenant, and that a Court of summary jurisdiction was justified upon a consideration of all the circumstances in refusing to order the landlord to pay an apportioned part of the expenses.

CASE stated by a metropolitan police magistrate, from which the following facts appeared.

A complaint had been preferred by the appellant, the lessee and occupier of premises let by the respondents to the appellant as a bakehouse, that the certificate required by s. 101, sub-s. 2, of the Factory and Workshop Act, 1901, could not be obtained, unless certain structural alterations were made as required by the Stepney Borough Council, and that the expenses of such alterations, to the amount of 148*l.* 13*s.*, ought to be borne by the respondents, the owners. (1) The premises were originally

(1) By 1 Edw. 7, c. 22 (The Factory and Workshop Act, 1901), s. 101, sub-s. 1, an underground bakehouse is not to be used as a bakehouse unless it was so used at the passing of the Act.

By sub-s. 2, subject to the foregoing provision, after January 1, 1904, an underground bakehouse is not to be used unless certified by the district council to be suitable for that purpose.

By sub-s. 8, "Where any place has

let on lease in 1892 to one Morris, and in 1893 were assigned to the appellant, who used them as a bakehouse until March 17, 1903, on which day a new lease of the premises for twenty-one years at a rental of 50*l.* a year was granted by the respondents to the appellant. The lease contained a covenant by the appellant that "the lessee will during the said term pay all existing and future taxes, rates, duties, assessments, impositions, and outgoings of every description for the time being payable either by landlord or tenant in respect of the said premises respectively (except landlord's property tax)." The learned magistrate found that the premises were let as a bakehouse, and that unless certain structural alterations, to the extent of 148*l.* 13*s.*, were made the certificate required by 1 Edw. 7, c. 22, s. 101, sub-s. 2, could not be obtained.

It was contended for the respondents that the covenant in the lease of March 17, 1903, above set out, was a contract on the part of the appellant to pay the expenses mentioned in s. 101, sub-s. 8, in that the words "impositions and outgoings" in that covenant covered such expenses. For the appellant it was contended that the covenant only applied to such sums of money coming under the category of "taxes, rates, &c.," as the landlord or tenant was bound by law to pay in respect of the premises, and that the expenses referred to in s. 101, sub-s. 8, were voluntary payments made merely for the purpose of enabling the appellant to carry on his business of a baker.

The learned magistrate upheld the contention of the respondents, and dismissed the complaint, and the tenant appealed.

The question of law for the opinion of the Court was

been let as a bakehouse, and the certificate required by this section cannot be obtained unless structural alterations are made, and the occupier alleges that the whole or part of the expenses of the alterations ought to be borne by the owner, he may by complaint apply to a Court of summary jurisdiction, and that Court may make such order concerning the expenses or their apportionment as appears to the Court to be just and equitable, under the circumstances of the case, regard being had to the terms of any contract between the parties, or in the alternative the Court may, at the request of the occupier, determine the lease."

1904

GOLDSTEIN v. HOLLINGSWORTH.

whether the expenses mentioned in s. 101, sub-s. 8, were covered by the words "impositions and outgoings" in the covenant.

Firminger, for the appellant. The magistrate ought to have made an order on the respondents, as the owners of the premises, for payment of the amount of the expenses incurred, or at least he should have apportioned them between the appellant and the respondents. The expenditure in question was not a compulsory payment on the part of the appellant; on the contrary, it was merely an optional payment made by him for the purpose of enabling him to carry on his business upon the premises; such a voluntary payment is not an imposition or outgoing within the meaning of the covenant: *Harris* v. *Hickman*. (1) It was not a compulsory payment which either the landlord or tenant was bound to make, and therefore does not fall within the covenant: *Foulger* v. *Arding*. (2) The jurisdiction of the magistrate to apportion the expenses between the landlord and tenant is not ousted by the covenant: *Monk* v. *Arnold*. (3)

Gilbert Mellor (*C. H. Perrott*, with him), for the respondents. The premises were not let as a bakehouse within the meaning of s. 101 of the Factory and Workshop Act, 1901, and in that case the magistrate had no jurisdiction to apportion the expenses. But, assuming that they were let as a bakehouse, he has exercised a judicial discretion upon a consideration of all the circumstances of the case, including the terms of the contract between the parties. The expenditure is an imposition or outgoing within the meaning of the appellant's covenant, and that is the only question left by the magistrate to the determination of this Court. *Monk* v. *Arnold* (3) is not an authority that the expenses should be apportioned, notwithstanding the lessee's covenant; that was a decision under s. 7 of the Factory and Workshop Act, 1891, which did not contain the words "regard being had to the terms of any contract between the parties."

(1) [1904] 1 K. B. 13. (2) [1902] 1 K. B. 700.
(3) [1902] 1 K. B. 761.

1904

GOLDSTEIN v. HOLLINGSWORTH.

LORD ALVERSTONE C.J. The only doubt which I have felt during the argument is whether we should deal with the case finally or whether it ought to be sent back to the learned magistrate, and this doubt arises, not from any difficulty in dealing with the facts found by him, but from the particular language used by him in stating the question of law for our determination. I have come, however, to the conclusion that there is no substantial ground for sending it back. The facts shew that this lease was granted in 1903 for twenty-one years from Lady Day, 1902; it was a lease of two messuages, and contained a covenant not to carry on a noxious trade, the trades of baker and butcher being excepted from that covenant. I feel some doubt whether the premises were let as a bakehouse within the meaning of sub-s. 8; I do not, however, decide that point, for it was not raised below. The lease contains a covenant by the tenant to pay "taxes, rates, duties, assessments, impositions, and outgoings," and this covenant, it must be remembered, was entered into subsequently to the passing of the Factory and Workshop Act, 1901, and subsequently also to the decisions of *Foulger* v. *Arding* (1) and *Monk* v. *Arnold*. (2) [His Lordship read the covenant.] Upon the question whether these particular expenses fall within the language of the particular covenant, it is hopeless to attempt to deal with the various authorities, which, as the Court of Appeal has pointed out in *Foulger* v. *Arding* (1), are quite irreconcilable; but in adopting the judgment in that case as the basis of our decision we are on firm ground. It has been contended on behalf of the appellant that this expenditure was not an imposition or outgoing payable by the tenant, because the expenditure of this sum for the purpose of obtaining a certificate under the Act was an optional act on the part of the tenant, who need not incur the expense if he did not want the certificate. I think, however, that this is not a correct method of applying s. 101, sub-s. 8. That sub-section contemplates the letting of the premises as a bakehouse and the possible ordering of structural alterations by the local authority, and that is what the parties in the present case also contemplated:

(1) [1902] 1 K. B. 700. (2) [1902] 1 K. B. 761.

1904

GOLDSTEIN v. HOLLINGSWORTH.

Lord Alverstone C.J.

the case is the converse of *Monk* v. *Arnold*. (1) In my opinion, when a magistrate, upon an application by the tenant under sub-s. 8, makes an order that a proportion, or the whole, of the outlay shall be borne by the owner, it would be impossible to contend—at any rate to successfully contend—that the expenditure was not an imposition or outgoing payable by the owner. The only point raised by the case is whether these expenses are within the lessee's covenant, and on that point I have no doubt whatever.

We have been pressed to send this case back on the ground that it must be inferred from the statement at the end of the case that the magistrate looked upon the objection made by the respondent as an objection to his jurisdiction, and that he has not exercised the jurisdiction conferred on him by the sub-section. But I think the learned magistrate intended to say, and I read the case as meaning, that, if the covenant covers this imposition, his decision refusing to make an order on the owner for payment of the expenses is to stand. And, further, I see no reason for sending the case back for reconsideration, because the lease is a lease for twenty-one years, and, having regard to the length of the term and to the fact that it was made after the Act of 1901 came into operation, it is neither just nor equitable to place upon the landlord the burden of an imposition or outgoing which the tenant has covenanted to pay. I do not say whether in a proper case, such as where the term had nearly expired, the magistrate might not exercise his jurisdiction, by determining the lease, to relieve the tenant of the burden; I reserved that question in *Monk* v. *Arnold*. (1) That decision was given on s. 7, sub-s. 2, of the Factory and Workshop Act, 1891, and that sub-section did not contain the words of s. 101, sub-s. 8, of the Act of 1901, which give so much importance to the language of the contract between the landlord and tenant. And there is this further difficulty, which is wholly independent of the statutory enactment, that, as soon as the expenses have been apportioned, the tenant can be sued by his landlord on the covenant to recover the amount which he has paid. I think, as I have already said, that the magis-

(1) [1902] 1 K. B. 761.

trate meant to ask us whether the tenant was right in his contention that these expenses were outside the covenant; that question can only be answered in the negative, and the appeal must be dismissed.

WILLS J. I am of the same opinion. On the question whether the magistrate had any jurisdiction at all, on the ground that the premises were not let as a bakehouse, I am clearly of opinion that they were so let, and that the facts are sufficient to bring the case within the statute; although the lease is not very strictly drawn, it undoubtedly contains a permission to use the premises as a bakehouse, and they always were so used. Then, if the magistrate had jurisdiction, as I think he clearly had, did he come to a right conclusion? The only question left for us to consider is whether these expenses were an imposition or outgoing within the meaning of the covenant, and that point has been practically decided in *Foulger* v. *Arding* (1), while in *Monk* v. *Arnold* (2) it seems to have been taken for granted that very similar expenses were an outgoing. I must confess to feeling considerable difficulty in understanding a passage in the judgment of Channell J. in *Monk* v. *Arnold* (2), in which he says that a payment of this kind, although an outgoing, might not be an outgoing for which the tenant could be sued upon his covenant unless it had been made the subject of specific mention between the parties. I cannot understand how, if a particular expense is an outgoing within the meaning of the covenant, it can make any difference whether it has been specially mentioned by the parties or not. I decline to accede to the suggestion that the case should be sent back to the magistrate for a rehearing: if the magistrate has taken the circumstances into consideration in his decision and has come to the conclusion that it would be unjust and inequitable to alter the contract which the parties made for themselves, cadit quæstio; if, however, he had ordered the landlord to bear a proportion of the expenses, the landlord, on paying the expenses, could sue the tenant on his

(1) [1902] 1 K. B. 700. (2) [1902] 1 K. B. 761.

1904

GOLDSTEIN v. HOLLINGSWORTH.

covenant and recover the money. I agree in the dismissal of the appeal.

KENNEDY J. I am of the same opinion. With regard to the question whether these premises were let as a bakehouse within the meaning of s. 101, as to which we are giving no decision, I must say, speaking for myself, that I doubt whether upon the evidence stated in the case they fall within the section at all. I cannot think, though it is not necessary to decide the point, that any equity to use the premises as a bakehouse arises because of their permissive user as such before the lease of 1903 was entered into. But in any case I think that it would be both useless and unjust to send the case back to the magistrate for a rehearing. The parties have agreed to treat the expenditure as an outgoing, and, as the tenant has covenanted to pay all outgoings, it would be neither just nor equitable to make an apportionment upon the landlord, and I must confess that I do not follow the distinction drawn by Channell J. in *Monk* v. *Arnold* (1) to which my brother Wills has already alluded. The question here is simply whether the tenant has bound himself to bear the outgoing, and, if he has, we are all agreed that directly an apportionment is made on the landlord the case would fall within the covenant, and he could sue the tenant to recover the apportioned amount. This answers the only question asked us in the case; and the appeal must therefore be dismissed.

Appeal dismissed.

Solicitor for appellant: *H. A. Lovett.*
Solicitor for respondents: *Arthur Blott.*

(1) [1902] 1 K. B. 761.

W. J. B.

MORRIS *v.* BEAL.

1904
July 13.

Factory Acts—Underground Bakehouse—Expenses of Alterations necessary to obtain certificated Suitability—Covenant by Tenant to pay "Outgoings"—Power of Magistrate to apportion Expenses between Landlord and Tenant—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 101, *sub-s.* 8.

Although premises may have been let as a bakehouse, and although the certificate required by s. 101 of the Factory and Workshop Act, 1901, cannot be obtained unless structural alterations are made, if the lease contains a covenant by the tenant to pay all "outgoings" a magistrate has no jurisdiction to make an order under sub-s. 8 of that section apportioning the expenses of those alterations between the landlord and the tenant:—

Semble, per Kennedy J., that premises are not "let as a bakehouse" within the meaning of the section unless the terms of the lease impose an obligation upon the tenant to use them as a bakehouse, and not merely confer a permission so to use them.

CASE stated by a metropolitan police magistrate.

A complaint was preferred by the respondent W. M. Beal against the appellant Frances Morris under s. 101, sub-s. 8, of the Factory and Workshop Act, 1901 (1), alleging that the appellant was the owner of the premises No. 118, Cambridge Road, Kilburn, a place let as a bakehouse, for which a certificate required by the said section could not be obtained unless structural alterations were made, and alleging that the whole of the expenses ought to be borne by the appellant.

At the hearing of the complaint the following facts were proved: The premises in question were demised by one G. H. Morris to one G. Ashby by an indenture dated April 17, 1886,

(1) By s. 101, sub-s. 8, of the Factory and Workshop Act, 1901, "Where any place has been let as a bakehouse, and the certificate required by this section cannot be obtained unless structural alterations are made, and the occupier alleges that the whole or part of the expenses of the alterations ought to be borne by the owner, he may by complaint apply to a Court of summary jurisdiction, and that Court may make such order concerning the expenses or their apportionment as appears to the Court to be just and equitable, under the circumstances of the case, regard being had to the terms of any contract between the parties; or in the alternative the Court may, at the request of the occupier, determine the lease."

1904

MORRIS v. BEAL.

for a term of twenty-one years from December 25, 1885. By an indenture dated March 24, 1889, the premises were assigned by G. Ashby to the respondent for the unexpired residue of the term. By an indenture dated July 25, 1899, the said G. H. Morris demised the said premises to the respondent, who was therein described as a baker, for a term of twenty-one years from June 24, 1899, together with "the use of the landlord's fixtures upon the said premises, including those mentioned or specified in the schedule hereunder written." Among the fixtures specified in the schedule was a "brick-built oven." By the said indenture the lessee covenanted that he would during the term pay "all existing and future taxes, rates, assessments, and outgoings, whether parliamentary, parochial, or otherwise, for the time being payable either by the landlord or tenant in respect of the said premises except landlord's property tax"; that he would "not erect or build or suffer to be erected or built any additional erection or building whatever on the said piece of ground or any part thereof, nor make any addition to the said messuage and buildings or any alteration in the elevation of the same either in front or rear"; and that he would "not without the previous written consent of the lessor carry on or permit to be carried on upon the said premises any trade or business other than that of a bread and biscuit baker and confectioner." For upwards of sixteen years before the date of the complaint an underground bakehouse existed and was used upon the said premises. The certificate required by s. 101 of the Factory and Workshop Act, 1901, could not be obtained in respect of the said bakehouse unless certain structural alterations were carried out upon the premises. The alterations in question were in fact carried out at an expense of 133*l.* 17*s.* 6*d.*, which sum was paid by the respondent. The appellant, Frances Morris, was the widow and successor in title of G. H. Morris, the lessor. On the part of the appellant it was contended that on the true construction of the lease of July 25, 1899, the premises had not been let as a bakehouse, and that unless they were so let the magistrate had no jurisdiction to make an order under s. 101, sub-s. 8, of the said Act; and further that by the covenants

on the respondent's part in the said lease he was liable to bear the expenses mentioned in the complaint, and that it was not just and equitable under the circumstances that an order should be made for payment of any part of such expenses by the appellant. The magistrate was of opinion that the said covenants did not impose on the respondent the obligation to pay the said expenses, and that it was just and equitable to make an order that the appellant should pay to the respondent the sum of 70*l.* in respect of the said expenses, and he made that order accordingly.

Barnard Lailey, for the appellant. The magistrate had no jurisdiction to impose any part of these expenses upon the landlord. In the first place, it is a condition precedent to his jurisdiction that the premises should have been "let as a bakehouse," that is to say, it must have been intended by the lease that they should be used as a bakehouse and as nothing else; and no inference of such intention can be drawn from the lease in the present case. It is not enough to bring the case within sub-s. 8 that they should have in fact been so used. Upon an application recently made before Farwell J., between the parties to the present case and with respect to the same premises, for an injunction to restrain the tenant from making the structural alterations required by the sanitary authority on the ground that to make them would be a breach of the covenant in the lease, the judge expressed the opinion that the premises were not let as a bakehouse, and granted the injunction, which he could not have done if they had been let as a bakehouse, for it would have been in derogation of the lessor's grant to refuse permission to make the alterations required. Secondly, the magistrate is bound to have regard to the terms of the contract between the parties, and if there is a covenant by the tenant to pay these expenses himself it cannot be just and equitable to require the landlord to pay part of them. In the present case there is such a covenant. The case upon this point is covered by the decision of this Court in *Goldstein* v. *Hollingsworth* (1), where it was held, in accordance with the

(1) Ante, p. 578.

1904

MORRIS v. BEAL.

decision of the Court of Appeal in *Foulger* v. *Arding* (1), that the expenses mentioned in this section were covered by the words "impositions and outgoings." It is true that in *Monk* v. *Arnold* (2) the Court suggested that it might be just and equitable to require the landlord to pay part of the expenses of complying with the requirements of the sanitary authority, notwithstanding that the tenant had covenanted to pay all outgoings; but that suggestion was unnecessary to the decision, for the case was decided before *Foulger* v. *Arding* (1) had been reversed in the Court of Appeal, and the Court held that the word "outgoings" did not cover the expenses in question. Upon neither ground can the case of *Monk* v. *Arnold* (2) now be supported. That the existence of a covenant by the tenant to pay these expenses is intended by sub-s. 8 to oust the jurisdiction of the magistrate to apportion them is shewn by the concluding provision that "in the alternative the Court may, at the request of the occupier, determine the lease." That suggests that unless the lease is put an end to the magistrate must abide by its terms.

Danckwerts, *K.C.*, and *A. Hutton*, for the respondent. The premises were let as a bakehouse. The tenant was described in the lease as a baker, the fixtures included a brick-built oven, and there was a covenant not to carry on any other trade than that of a bread and biscuit maker. It is enough to bring the case within the section that the lessor should have contemplated the premises being used by the tenant as a bakehouse; it is not necessary that he should have required them to be so used. Then if the premises were let as a bakehouse the magistrate had jurisdiction to entertain the complaint, and under the circumstances of the case he was entitled to make the order of apportionment, which he did. The covenant to pay outgoings does not cover these expenses. As was said by Collins M.R. in *Foulger* v. *Arding* (3), "the covenant must be assumed to relate only to matters which may reasonably be supposed to have been contemplated by the parties as being within the purview of such a contract." And it could not be

(1) [1902] 1 K. B. 700. (2) [1902] 1 K. B. 761.
(3) [1902] 1 K. B. 700, at p. 706.

supposed that the parties at the time of entering into this lease contemplated that an Act of Parliament would be subsequently passed creating an obligation of this onerous description. In *Valpy* v. *St. Leonards Wharf Co.* (1) Farwell J., applying that dictum, held that an agreement by the tenant of a cottage upon a yearly tenancy to pay outgoings did not include the expense of paving a yard in obedience to an order of the local authority at a cost of nearly three times the rental of the cottage. The decision in *Goldstein* v. *Hollingsworth* (2) does not in any way conflict with this principle, for there the lease was dated subsequently to the passing of the Act of 1901, and the parties consequently knew exactly what obligations were being incurred, and Lord Alverstone C.J. in his judgment expressly laid stress on that fact. But further, assuming that the covenant does include these expenses, still the magistrate was entitled to set aside the contract if in his opinion justice and equity demanded it. He is, no doubt, to have "regard to the terms of any contract between the parties," but only as one of the circumstances of the case. This clearly was the view taken by the Court in *Monk* v. *Arnold* (3), where the decision turned upon s. 7 of the Factory and Workshop Act, 1891, which empowered the county court to "make such order as appears to the Court just and equitable under all the circumstances of the case." Lord Alverstone C.J. said: "If the Legislature had intended that only questions arising out of the covenant between the landlord and the tenant should be discussed, it would have used different language. But bearing in mind all the cases which might arise, it is obviously just and right that the county court judge should have an equitable jurisdiction to determine how the amount which has been expended shall be apportioned." Darling J. said: "The Legislature were engaged in remedial legislation, and they seem to have thought that in such a case the county court judge ought to have jurisdiction to do something more than make an order which would be according to the strict legal rights of the parties, but that he should have regard in any order he might

(1) (1903) 1 L. G. R. 305. (2) Ante, p. 578.
(3) [1902] 1 K. B. 761.

1904

MORRIS v. BEAL.

make to the whole justice and equity of the case." And Channell J. said: "They gave the county court judge power to say how the liability should ultimately fall, and for that purpose they gave him, as I think, power over the contract which had been entered into between the landlord and the tenant." The provision at the end of s. 101, sub-s. 8, to the effect that "the Court may, at the request of the occupier, determine the lease," so far from being in the appellant's favour is against him; for if it may be "just and equitable" to put an end to a contract altogether, a fortiori may it be so merely to modify one of its terms. The true meaning of the magistrate's decision in this case is that he thought it was just and equitable under the circumstances to make the order even though the covenant applied to these expenses. The case of *Goldstein* v. *Hollingsworth* (1) does not bind the Court upon this point. It only purported to be a decision as to the meaning and scope of the covenant, and the Court held that if the magistrate was of opinion that the covenant applied to the structural alterations he might hold it to be just and equitable to leave the tenant to bear the whole expense; they did not decide that he must so hold. If the case is to be taken to have decided more, it is in conflict with *Monk* v. *Arnold* (2), and the earlier case is to be preferred.

LORD ALVERSTONE C.J. The question in this case is whether it can be successfully distinguished from *Goldstein* v. *Hollingsworth*. (1) It is possible that grounds may be suggested for reviewing that decision, but at all events we are bound by it here. As the present case may go further, I wish to refer to my judgment in *Goldstein* v. *Hollingsworth* (1) in order to prevent any mistake as to the grounds of my decision in that case. It is true that I pointed out that the lease in that case was granted after the passing of the Act of 1901 and after the decision in *Foulger* v. *Arding* (3); but that was not the ground upon which I held that the covenant included the payments in question. I construed it as covering expenses of

(1) Ante, p. 578. (2) [1902] 1 K. B. 761.
(3) [1902] 1 K. B. 700.

this kind because of the construction which had been put by the Court of Appeal upon a similar covenant in *Foulger* v. *Arding* (1), and without regard to the date at which the covenant was entered into. The question, then, is whether the decision in *Goldstein* v. *Hollingsworth* (2) covers the present case. Here the premises, which were let for a term of twenty-one years, were in my opinion let as a bakehouse, and under conditions whereby the tenant was bound to keep them up as such, and they are therefore primâ facie premises to which the provisions of s. 101, sub-s. 8, apply. In *Goldstein's Case* (2) the magistrate held that the expenses were covered by the words "impositions and outgoings," and upon that ground declined to apportion the expenses. We were of opinion that he was right in so interpreting the covenant, and accordingly affirmed his decision. In the present case the magistrate states he was of opinion "that the covenants did not impose any obligation upon the respondent to pay the expenses, and that it was just and equitable to make the order," by which I understand him to have meant that the word "outgoings" did not cover these particular expenses, and that therefore the burden of them was not put upon the tenant. Mr. Danckwerts has pressed us to interpret the magistrate's language as meaning that, even assuming that the covenant applied to these expenses, it was in the magistrate's opinion not just or equitable to enforce that covenant under the circumstances of the case. I do not think that that would be a fair construction of his language. But even if that was his meaning, it does not help the respondent, for in my opinion the magistrate would have no jurisdiction so to hold. For, as was pointed out by both Wills and Kennedy JJ. in *Goldstein's Case* (2), where there is in the lease an express covenant by the tenant to pay the expenses, the question of what is just and equitable does not arise. A strong argument in favour of this view is to be found in the provision at the end of the sub-section, that the Court may at the request of the occupier determine the lease. This points to the conclusion that the magistrate is not authorized by the section to disregard the covenants of the lease so long as the

(1) [1902] 1 K. B. 700. (2) Ante, p. 578.

1904

MORRIS v. BEAL.

lease itself stands. I think the magistrate was wrong in the view which he took, and that the appeal must be allowed.

KENNEDY J. I am of the same opinion. Upon the question whether the premises were "let as a bakehouse" within the meaning of the sub-section I express no opinion, for in the view which we take it becomes unnecessary to decide the point. Speaking for myself, I may say that I think that the sub-section was intended to protect the tenant against hardship, and that from that point of view it would not be an unreasonable construction to suppose that it was intended to apply to a case in which the tenant was prohibited by the terms of the lease from using the premises for any other purpose than that of a bakehouse. If the premises are let upon the terms that the tenant not only may but must use them as a bakehouse, then, in the event of the district council requiring the making of structural alterations as a condition of the grant of a certificate, the tenant would be compelled either to satisfy the council's requirements at his own expense or else abandon the use of the premises altogether. It was, in my opinion, to remedy that possible hardship that sub-s. 8 was introduced. With regard to the other point, I am clearly of opinion that the case is exactly covered by the decision in *Goldstein* v. *Hollingsworth*. (1) We are bound by that decision, and I entirely agree with it. It is plain from what the magistrate has stated in the present case that the grounds upon which he made the order was that in his opinion a covenant to pay outgoings did not include the expenses of these structural alterations. In that he was wrong.

PHILLIMORE J. I am of the same opinion. I will put my judgment in the four following propositions: First, I refrain from entertaining or expressing any doubt as to the correctness of the decision in *Goldstein* v. *Hollingsworth* (1); it is binding upon us in this Court. Secondly, it is in my opinion undesirable to allow the construction of this covenant to vary with minute differences in the language in which it is expressed. It

(1) Ante, p. 578.

1904

MORRIS v. BEAL.

Phillimore J.

is a covenant which has been very fruitful of litigation, and it appears to me that the only way to deal with it is to put a broad construction upon the language and adhere to it. Then the parties will know what to understand by it. Thirdly, I concur with Kennedy J. in reserving the question whether these premises were let as a bakehouse. It may be that the observations of Farwell J. may have to be considered when the occasion arises. Lastly, before the magistrate can put in force the equitable provisions of this sub-section, he must find as a fact, not merely that the premises are used as a bakehouse, but that they were let as a bakehouse, and he should state that finding in the case. Here it is not so stated.

Appeal allowed.

Solicitor for appellant: *G. B. Crook.*

Solicitors for respondent: *Young & Sons.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.

1904

July 18.

MILLETT *v.* BALLARD.

County Court—Practice—Action of Ejectment—Appeal as of Right—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 120.

In actions of ejectment, as distinguished from actions for the recovery by landlords of tenements, tried in a county court, there is a right of appeal to the High Court, irrespective of the value or rental of the premises sought to be recovered.

Shrewsbury (*Earl of*) v. *Garfield*, (1891) 60 L. J. (Q.B.) 765, overruled.

APPEAL from a decision of a Divisional Court upon appeal from a county court.

On the appeal coming on for hearing in the Divisional Court objection was taken on behalf of the plaintiff, in whose favour judgment was given in the county court, that no appeal lay from that judgment except by leave of the judge, and that no leave had been granted. It appeared that the action was brought by the plaintiff for a declaration that he was entitled to possession of a piece of land for a term of years created by

C. A. 1904

MILLETT v. BALLARD.

an indenture of lease, and to eject the defendant therefrom. The allegation was that the defendant had wrongfully taken possession of, and had fenced off, a strip of land included in the lease. The annual value of the land which it was sought to recover was less than 5*l*. The county court judge gave judgment for the plaintiff, and no leave to appeal was granted. Under these circumstances the Divisional Court (Lord Alverstone C.J., Kennedy J., and Phillimore J.) dismissed the appeal upon the authority of *Shrewsbury* (*Earl of*) v. *Garfield* (1), but gave leave to appeal.

The defendant appealed.

J. E. Bankes, K.C., and *S. G. Lushington*, for the defendant. The question is whether on the true construction of s. 120 of the County Courts Act, 1888, the unsuccessful party in an action of ejectment brought in the county court has an absolute right of appeal, irrespective of value. The Divisional Court decided the point on the authority of *Shrewsbury* (*Earl of*) v. *Garfield* (1); but that case, it is submitted, cannot be supported.

The restrictions as to appeal in actions for "the recovery of tenements" where the value does not exceed 20*l*. do not apply to actions of ejectment, as the words have throughout the whole of the County Courts Acts a special meaning. The distinction is first drawn in the Act of 1846 (9 & 10 Vict. c. 95), for by s. 58 the Courts are not to have cognizance of any action of ejectment, or in which title to any corporeal or incorporeal hereditaments shall be in question; but by s. 122 possession of small tenements may be recovered by plaint in a county court. The Act of 1850 (13 & 14 Vict. c. 61) by s. 1 excepts from its operation the actions excepted by s. 58 of the previous Act, and gave for the first time by s. 14 a power of appeal. The Act of 1856 (19 & 20 Vict. c. 108) by s. 25 gave jurisdiction by consent where title incidentally came in question, and in s. 50 re-enacted the provisions as to the recovery of possession of small tenements. Sect. 68 gave a right of appeal in replevin, actions for the recovery of tenements, and proceedings in interpleader, and in those cases imposed the restriction that the value involved

(1) 60 L. J. (Q.B.) 765.

must exceed 20*l*. Up to that time there was no jurisdiction in cases of ejectment other than those described as for "the recovery of tenements" by a landlord, except the jurisdiction by consent given by s. 25 of the Act of 1856. The Act of 1867 (30 & 31 Vict. c. 142) by s. 11 gave jurisdiction in ejectment where neither the value nor the rent exceeded the sum of 20*l*., and by s. 13 gave an appeal on the same grounds and subject to the same conditions as were provided by s. 14 of the Act of 1850, which contains no restriction as to value and was generally applicable to all cases that could be tried in a county court. It also introduced appeals by leave of the judge in actions in which an appeal was not allowed. This last clause would apply to the restriction as to the value involved in replevin, recovery of tenements, and interpleader imposed by s. 68 of the Act of 1856. The consolidating Act of 1888 (51 & 52 Vict. c. 43) repealed all previous statutes; but the distinction between actions of ejectment and actions for the recovery of tenements by a landlord is kept alive. Sect. 59 in Part III. deals with the former and gives jurisdiction up to 50*l*., and ss. 138 and 139, in Part VI., of which one of the headings is "Recovery of Tenements," deal with the recovery of small tenements by landlords, where the term has expired or been determined by notice, or for non-payment of rent. Part V. deals with appeals, and by s. 120 the conditions of appeal are to be provided by rules. There is a proviso limiting the right to appeal in cases under a certain value except by leave; but from this proviso "an action of ejectment or an action in which the title to any corporeal or incorporeal hereditament shall have come in "question" is expressly excepted. Order v., r. 3, of the County Court Rules, 1889, is: "where an action can be brought to recover possession of a tenement under the provisions of ss. 138 and 139 of the Act, no action shall be brought under s. 59 of the same Act. Actions brought under the former sections shall be distinguished as actions for the recovery of possession, and actions under the last section shall be distinguished as actions for the recovery of land." (1) In view of the distinction carried throughout all the Acts the limitation of

(1) See now Order v., r. 3, of the County Court Rules, 1903.

C. A. 1904

MILLETT v. BALLARD.

value applicable to the recovery of possession of tenements, cannot, in spite of the generality of the word, be applied to actions of ejectment such as the present.

M. Shearman, K.C., and *H. B. D. Woodcock*, for the plaintiff. The expression in the proviso to s. 120, "any action for the recovery of tenements," is wide enough to cover an action such as this. The word "tenements" occurs twice in s. 59 coupled with lands and hereditaments. In s. 120 the proviso is: "There shall be no appeal in any action of contract or tort, other than an action of ejectment or an action in which the title to any corporeal or incorporeal hereditament shall have come in question." An action of ejectment cannot properly be called an action either of contract or of tort, and it stands in a class by itself. The proviso deals with the question of value in an action of contract or tort, then with replevin, then with recovery of tenements, including actions of ejectment previously excluded from the class of contract or tort, and then with interpleader, and in each case imposes a monetary limitation on the absolute right of appeal. The expression "value" is inapplicable to a case between landlord and tenant, but would be applicable in cases of ejectment. All the county court legislation, except possibly the Act of 1867, has proceeded upon the principle of limiting appeals, and it is reasonable to think that the Legislature in this consolidating Act intended to put actions of ejectment upon the same footing in this respect as the other matters dealt with. No ground of policy has been brought forward for limiting the very wide word "tenements" so as to exclude actions of ejectment from the proviso, and the authority of *Shrewsbury* (*Earl of*) v. *Garfield* (1), which was decided in 1891, is to the contrary effect.

J. E. Bankes, K.C., in reply.

COLLINS M.R. This is an appeal from a decision of a Divisional Court on an appeal to that Court in an action of ejectment brought in a county court. The question raised is whether an appeal lay as a matter of right, in the absence of any leave to appeal by the county court judge. The Court felt

(1) 60 L. J. (Q.B.) 765.

themselves bound by a previous decision of a Divisional Court in the case of *Shrewsbury (Earl of)* v. *Garfield* (1), in which the head-note is: "No appeal lies to the High Court, without leave, from the decision of a judge of a county court in actions for the recovery of tenements, whether the parties be landlord and tenant or otherwise, or whether the title to such premises be in question or not, where the yearly rent or value thereof does not exceed 20*l*." The Court below, though I gather that they did not altogether assent to the decision in that case, felt themselves bound by it, and dismissed the appeal upon the preliminary objection to their jurisdiction to hear it; but gave leave to appeal to this Court.

The present action is not, according to the primâ facie meaning of the words used in the County Court Acts, an action "to recover possession of a tenement"; it is what, before the passing of the Judicature Acts, was known as an action of ejectment, and throughout the whole course of the legislation in the County Court Acts a distinction has been made between actions of ejectment on title, or actions in which the title to hereditaments is in question, and actions for the recovery of small tenements which put in suit the rights of landlord and tenant. Turning first to the County Courts Act, 1888, which repealed all previous County Court Acts, s. 120 contains the existing law on the matter. That section deals with appeals from a county court, and contains a proviso that "there shall be no appeal in any action of contract or tort, other than an action of ejectment or an action in which the title to any corporeal or incorporeal hereditament shall have come in question, where the debt or damage claimed does not exceed twenty pounds, nor in any action of replevin, where the amount of rent or the damage or value of the goods seized does not exceed twenty pounds, nor in any action for the recovery of tenements where the yearly rent or value of the premises does not exceed twenty pounds, nor in proceedings in interpleader where the money claimed or the value of the goods or chattels claimed, or of the proceeds thereof, does not exceed twenty pounds, unless the judge shall think it reasonable and proper that such appeal

(1) 60 L. J. (Q.B.) 765.

C. A. 1904

MILLETT v. BALLARD.

Collins M.R.

should be allowed, and shall grant leave to appeal." On the natural construction of that proviso it seems that an action of ejectment, or one in which the title to any hereditament is in question, is excepted from the legislation which limits the right of appeal to cases that involve a certain value. In view of that exception, the question arises as to the meaning to be attached to the words that follow later in the section with regard to actions for the recovery of tenements. Those words, in my judgment, can only be construed as referring to something different from the actions of ejectment previously dealt with; for it is obvious that a distinction was intended to be drawn between the two classes of actions, for the one is excepted from the operation of the proviso, while the other is made subject to a provision as to the amount of the yearly rent or value of the premises. Primâ facie, upon the provisions of this section I should have thought that an action of ejectment was excluded from its operation, and that the right of appeal was absolute.

The matter, however, does not stop there; but before looking at the earlier legislation, as we have the right to do, we have the assistance of the County Court Rules, which, though they have not the validity of an enactment, are a contemporaneous exposition of the law by persons of authority. In Order v., r. 3, of the County Court Rules, 1889, we find that actions brought to recover possession of tenements under the provisions of s. 138 or s. 139 of the Act are to be distinguished as actions for the recovery of possession, and actions brought under s. 59 are to be distinguished as actions for the recovery of land. That points clearly to two classes of actions, and the different sections that deal with them. Sect. 59 so referred to provides that "all actions of ejectment, where neither the value of the lands, tenements, or hereditaments, nor the rent payable in respect thereof, shall exceed the sum of fifty pounds by the year, may be brought and prosecuted in the Court of the district in which the lands, tenements, or hereditaments are situate." No doubt the word "tenements" is there used as well as lands and hereditaments, but lower down in the section it drops out where provision is made for application that the case should be tried in the High Court on the ground that

title to "lands or hereditaments of greater value than fifty pounds" would be affected by the decision. Sects. 138 and 139 occur in another part of the Act, Part VI., which is headed "Replevin; Recovery of Tenements," indicating that the matters dealt with in those sections are different from those that are dealt with in s. 59; and this is consistent with the side-notes, which deal with the recovery of small tenements by landlords, where the term has expired or been determined by notice, or for non-payment of rent.

That being the state of things on the section itself, I pass to the consideration of the earlier Acts of 1846, 1850, 1856, and 1867, and in them I find confirmation of the primâ facie view arising from the section. In the Act of 1846, jurisdiction in ejectment on title was excluded, but provision was made for the recovery of small tenements. Thus at the outset a distinction was drawn between the two classes of actions. Jurisdiction in ejectment, except by agreement, was first given by the County Courts Act, 1867, and a right of appeal was conferred by s. 13 on the grounds and conditions provided by s. 14 of the Act of 1850, which contains no restriction relating to value. It is not necessary to go in detail through the provisions of the Acts prior to the Act of 1888, which was a consolidating statute. Having regard to the previous legislation, it seems to me to be clear that s. 120 of that Act must be construed in its grammatical and natural sense, and that different words were used in it to indicate two well-understood classes of actions—on the one hand actions of ejectment, and on the other actions for the recovery of tenements—and that the Legislature did not when dealing with the second class intend to deal with the former class that had been previously excluded.

I come, therefore, to the conclusion that the appeal should be allowed.

STIRLING L.J. I am of the same opinion. The difficulty in this case arises from the fact that from the commencement of the legislation a distinction has been drawn in the various statutes that deal with the matter between actions of ejectment

C. A. 1904

MILLETT v. BALLARD.

Stirling L.J.

and actions for the recovery of tenements in certain cases between landlord and tenant. Under the Act of 1846, by s. 58 it is provided that the county court shall not have cognizance of any action of ejectment or in which the title to any corporeal or incorporeal hereditaments shall be in question. Yet by s. 122 it is enacted that "when and so soon as the term and interest of the tenant of any house, land, or other corporeal hereditament, where the value of the premises or the rent payable in respect of such tenancy did not exceed the sum of fifty pounds by the year, and upon which no fine shall have been paid, shall have ended, or shall have been duly determined by a legal notice to quit," a plaint for the recovery of possession may be entered by the landlord or his agent in the county court. That proceeding to recover possession is in reality a species of action of ejectment. That section is repealed and re-enacted in other words by s. 50 of the Act of 1856 (19 & 20 Vict. c. 108). In that state of things the amending statute of 1867 was passed, and by s. 11 "all actions of ejectment where neither the value of the lands, tenements, or hereditaments, nor the rent payable in respect thereof, shall exceed the sum of twenty pounds by the year, may be brought and prosecuted in the county court of the district in which the lands, tenements, or hereditaments are situate." It should be noticed that the limit of value in the sections in the previous Act relating to the recovery of small tenements was 50*l.*—a larger sum than that mentioned in the section that I have just read of the Act of 1867. In 1888 a consolidation Act was passed, and I think it is impossible to look at the prior legislation without coming to the conclusion that s. 120 of the Act of 1888 was meant to gather together the provisions as to the right of appeal with regard to actions of ejectment and actions for the recovery of tenements, as well as other classes of actions, which were scattered through the previous Acts. In that way, the contrast between actions of ejectment and actions between landlord and tenant for the recovery of tenements is made more apparent, but the conclusion appears inevitable that there was no intention to alter the existing state of things under which an action of ejectment

was appealable as of right without regard to the question of value. Sect. 59, which relates to "ejectment where neither value nor rent exceeds 50*l*.," occurs in Part III. of the Act, and in Part VI., which is headed "Replevin; Recovery of Tenements," there are, in the ss. 138 and 139, provisions for the recovery of possession by landlords of small tenements, where the term has expired or been determined, or for non-payment of rent. It seems to me, looking at the prior legislation and at the provisions of the Act of 1888, it is reasonable to conclude that the right of appeal in actions of ejectment tried in county courts is absolute, and not governed by the restrictions on appeal found in s. 120, which in my opinion are confined to actions relating to the recovery by landlords of small tenements, and I agree that the appeal should be allowed.

MATHEW L.J. concurred.

Appeal allowed.

Solicitors for plaintiff: *James White & Leonard.*
Solicitors for defendant: *Bramall & White.*

A. M.

C. A.
1904
July 14, 15.

[IN THE COURT OF APPEAL.]

HALL AND WIFE *v.* LEES AND OTHERS.

Master and Servant—Negligence—Master's Liability—Nursing Association—Contract to supply Nurse—Injury to Patient through Negligence of Nurse.

The defendants were an association whose object was to provide for the supply of duly qualified nurses to attend on the sick in a certain neighbourhood. The association for that purpose appointed and paid salaries to nurses, for whose services they made charges to persons on whose application the nurses were supplied. The association issued printed rules and regulations with regard to the duties of their nurses and other matters with a view as well to the protection of the nurses as to ensuring their efficiency while engaged in nursing. These regulations provided for the exercise of certain supervision over the nurses by a superintendent appointed by the association; but, with regard to the work of a nurse while engaged in nursing a patient, it was provided (inter alia) that, while so engaged, she should not absent herself from duty without the permission of the patient's friends, and that she should implicitly follow the instructions of the patient's medical man. A form, which was sent out by the association upon supplying nurses, indicated to the person applying for the nurse that, while engaged in nursing the patient, the nurse was to be regarded as employed by that person. Two nurses were supplied by the association for the purpose of nursing the female plaintiff through an operation which was about to be performed upon her by a medical man in attendance upon her. An injury was occasioned to the female plaintiff through the negligence of the nurses, or one of them, while engaged in nursing her:—

Held, that, upon the true construction of the documents in relation to the supply of the nurses, the contract of the association was, not to nurse the female plaintiff through the agency of the nurses as their servants, but merely to procure for her duly qualified nurses, and that the nurses were not, in nursing the female plaintiff, acting as the servants of the association; and therefore the defendants were not liable in respect of negligence of the nurses supplied by them.

APPLICATION for judgment or a new trial in an action tried before Jelf J. with a jury.

The action was brought by the male plaintiff and his wife against the committee of an association called the Oldham Nursing Association, for damages in respect of personal injuries to the female plaintiff, alleged to have been caused by

the negligence of a nurse or nurses supplied by the association, and expense thereby occasioned to the male plaintiff.

It appeared that the object of the association, which was supported by the contributions of subscribers and donors, and whose operations were not carried on for personal profit, was to provide for the supply of duly qualified nurses to attend on the sick in the neighbourhood of Oldham. For that purpose they had an establishment, where nurses appointed by them, and to whom they paid salaries, were kept. They supplied nurses for poor patients gratuitously, but, in cases where patients, or their friends, were able to pay for nursing, they charged the person who required a nurse for her services. A serious operation having to be performed upon the female plaintiff, the medical man employed to perform the operation applied to the association for the services of two nurses to attend on the female plaintiff for the purposes of the operation, asking for a particular nurse with whose qualifications he was acquainted. The nurse for whom he particularly asked was engaged elsewhere, but two other nurses were sent by the association. Through the negligence of the nurses or one of them, according to the finding of the jury, a hot-water bottle, which was used to prevent collapse after the operation, came, when very highly heated, into immediate contact with the female plaintiff's body, instead of being shielded by the intervention of a blanket, as it should have been, while she was under the influence of anæsthetics; and she was thereby severely burned before any one was aware of the mischief which was occurring.

Printed rules and regulations were issued by the association, the most material of which were as follows :—

"1. Name.—This institution shall be named the Oldham Nursing Association. 2. Object.—To supply aid and instruction in skilled nursing by nurses located in Oldham in accordance with these rules and regulations. 3. Annual Meeting.—A meeting of annual subscribers of not less than 10*s.* and of donors of not less than 5*l.*, convened by notice in the local papers, shall be held yearly in the month of January, at which a report and duly audited balance-sheet shall be presented, and

C. A. 1904

HALL v. LEES.

the officers and executive committee elected. 5. Officers and House Committee.—The officers shall consist of president, treasurer, and secretary or secretaries. The house committee shall consist of the officers, with not less than seven ladies and three gentlemen, one of whom shall be a doctor. 6. Superintendent.—To be appointed by the house committee, one month's notice for the termination of the appointment to be given on either side. Duties.—(*a*) To receive all applications for nursing service, and promptly attend to the same; (*c*) to pay all moneys received for nursing to the treasurer as directed by the house committee; (*f*) to be responsible for the good order and comfort of the house; (*g*) to purchase provisions and household requirements, as directed by the house committee, and to see that articles supplied are equal to sample; (*h*) to control the work of the domestic servants; (*i*) to superintend the work of the nurses, and to devote what time she can command to nursing duties; (*j*) to see that the rules and regulations are duly carried out; (*k*) to give to the house committee a monthly report of her work. 7. Nurses.—(*a*) Nurses shall be supplied to attend infectious cases; (*b*) maternity nursing shall be undertaken; (*c*) a proportion of nurses shall be reserved for non-infectious medical and surgical cases only. (*d*) Appointment and Discharge.—Nurses to be appointed or discharged by the house committee in consultation with the superintendent. Nurses shall be recommended for appointment by the superintendent to the house committee; for the termination of such appointment one month's notice shall be given on either side. Any nurse who infringes the rules or is guilty of misconduct is liable to dismissal by the superintendent without notice after consultation with the president or the doctor on the house committee or one of the secretaries. (*e*) Qualifications.—Each nurse shall have had at least two years' training in a general hospital, and none shall be eligible for appointment who are over thirty-five years of age. (*f*) Leave of Absence.—Each nurse shall have three weeks' holiday in the year, the time to be fixed by the superintendent, who also shall, in circumstances of urgency, grant to a nurse leave of absence from duty for any time not exceeding three days. Except when actively employed,

or when the consent of the superintendent has been obtained, nurses must not be out of the home after 8 P.M. (*g*) General Deportment.—Each nurse shall be expected to devote all her energy and skill to the work entrusted to her, namely, by affording aid and instruction for the relief of suffering, and the promotion of recovery from sickness; she shall avoid gossip, and not interfere with the domestic affairs or with the religious opinions of the patients. (*h*) Responsible to Superintendent.—Each nurse shall be responsible to the superintendent, to whom she shall at once refer in a case of doubt or difficulty, and shall conform to her instructions in all matters pertaining to work and conduct, and shall give to her a daily account of work done, and pay each day to the superintendent any money received for nursing. 8. Regulations as to Nurses when on Duty.—(*a*) Each nurse, when engaged in district nursing, is expected to work eight hours daily, and to fill up a register of her cases as instructed. She shall leave the home for the discharge of her duties at 8.30 A.M., and return to dinner at 1 P.M.; subsequent work being undertaken in the afternoon or evening, as may be required. (*b*) On Sundays her duties shall be limited to urgent cases, the remainder of the day to be at her disposal for rest and religious duties. (*c*) Each nurse, when engaged in weekly nursing, shall be allowed eight hours' sleep and two hours' leisure daily; when on duty she shall wear the uniform provided for her. (*d*) When a nurse is engaged in continuous nursing and sleeps at the home, she shall be allowed ten hours out of the patient's house, the time being arranged to suit the doctor attending. (*e*) When at a case the nurse shall not absent herself from duty without permission from the patient's friends. (*h*) Nurses shall not be allowed to receive presents of any kind from the patients or their friends. (*i*) When required to sit up at night the nurse shall be permitted to have eight consecutive hours of undisturbed rest out of the sick room, in addition to one and a half hours for meals and one hour for outdoor exercise. (*j*) Only such cases shall be undertaken as are attended by a medical man, whose instructions the nurse must implicitly follow. 10. Charges.—(*a*) to (*i*) stated scales of charges. (*j*) Charitable cases, which are deemed

C. A. 1904

HALL v. LEES.

worthy by the superintendent and the house committee shall be attended; but the nurse must not be expected to perform duties which should be done by the patient's ordinary attendants. (*k*) Payments for nursing should be made to the superintendent at the time of application; if this is not done, then to the nurse when her visits are made. (*m*) Washing to be charged 2*s*. 6*d*. per week, which sum, as well as travelling expenses, should be paid to the nurse."

The practice of the association was that, when a nurse was supplied by them as in the present case, a printed form was sent with the nurse, signed by the lady superintendent, headed "Oldham Nursing Association," and stating on whose request the nurse was sent, and the charges that would be made for her services. It further stated that not less than twenty-four hours' notice of the return of a nurse must be given to the superintendent, and that the limit of continuous attendance on a case was eight weeks, which the superintendent was empowered to prolong in special circumstances, but that the committee reserved to the superintendent the right to withdraw the nurse at any time. It also contained the following notice: "For the successful working of the association it is absolutely needful that the committee and the lady superintendent should have an accurate knowledge of the conduct, capacity, and other qualifications of their nurses. It is therefore requested that the annexed form be filled up correctly and sent direct to the lady superintendent." Annexed was a form headed "Discharge and Confidential Report to be returned twenty-four hours before the termination of the nurse's services." It contained a space to be filled in by the medical attendant with a report as to the nurse's efficiency as a nurse, and another space for a report as to "her care and kindness in attendance on patient," and "her general conduct," "to be filled in by employer." These forms had been sent with the nurses in this case. The association had charged the male plaintiff for the services of the two nurses.

The learned judge left the following questions to the jury. 1. Was the injury to the female plaintiff caused by negligence on the part of the nurses or either of them? 2. Did the

association undertake to nurse the female plaintiff through the agency of the two nurses as their servants, or only to procure for her the services of two nurses? The jury answered the first question in the affirmative, and they found in answer to the second question that the association had undertaken to nurse the female plaintiff through the agency of the nurses as their servants. They assessed the damages at 300*l*.

Montague Lush, *K.C.*, and *T. F. Byrne*, for the defendants. The second finding of the jury cannot be supported. The matter was not really one for them. The proper inference of law from the documents in this case is that the contract of the association was, not to nurse the female plaintiff through the nurses as their servants, but merely to procure for her competent nurses for that purpose. Assuming that the nurses may have been for certain purposes in the employ of the association, it does not follow that they were acting as their servants in nursing the female plaintiff. The facts that the association appoint, dismiss, and pay the nurses, and are paid for their services, are not conclusive with regard to this question. Those matters are no doubt subsidiary elements for consideration, in dealing with the question whether the relation of master and servant exists, so as to render a defendant liable on the principle, respondeat superior; but the cardinal test ultimately is, according to the authorities, whether the person through whose negligence injury has been occasioned was under the control of the defendant, in doing the work in the course of which the accident happened. The association obviously cannot control the nurse while engaged in nursing at a patient's house. The object of the association, as shewn by its rules, is to ensure a supply of competent nurses when needed by patients in a certain neighbourhood, not themselves to undertake the nursing of patients through their servants. By the express terms of the regulations, the nurse, when on duty at the house of a patient, is to be subject to the control of the medical man attending the patient; and the form sent with the nurse to the house of the patient clearly imports that the person requiring the services of the nurse is to be considered

C. A. 1904

HALL v. LEES.

the employer. Certain of the provisions contained in the seventh and eighth regulations of the association may be relied on by the plaintiffs as shewing that the association retained control of the nurse while engaged in the work of nursing the patient. But they have not that effect. They are regulations framed merely with the object of protecting the nurses, and also ensuring efficiency on their part.

It is well settled by the authorities that, though a man may for general purposes be the servant of one person, nevertheless he may have been the servant of another pro hâc vice, i.e., for the occasion upon which his negligence has occasioned injury. In this case the nurse may perhaps for certain purposes have been the servant of the association, but, in nursing a patient under the directions of the patient's medical man, she was not acting as their servant. The principle upon which a master is liable in such cases for the acts or negligence of his servant is that he has put the servant in his place to do what he himself undertook or intended to do. It is submitted that this principle is not applicable here, because the association never undertook to nurse the patient.

[They cited *Murray* v. *Currie* (1); *The Halley* (2); *Donovan* v. *Laing, &c., Syndicate.* (3)]

Pickford, K.C., and *W. Ambrose Jones*, for the plaintiffs. The verdict of the jury was correct, and at any rate there was ample evidence entitling them to answer the questions put by the learned judge as they did. All the elements which ordinarily constitute the relation of master and servant existed as between the association and the nurses while engaged in the work of nursing in this case. The association appointed and paid the nurses, and could dismiss them, and they received the profits of their work. The facts are really conclusive to shew that they exercised control over the nurses within the doctrine which makes the master responsible for the acts or negligence of his servant. The regulations of the association provide that the nurses shall be responsible to the superintendent appointed by the association, and shall refer to her any case of doubt or

(1) (1870) L. R. 6 C. P. 24. (2) (1868) L. R. 2 P. C. 193.
(3) [1893] 1 Q. B. 629.

difficulty, and conform to her instructions, and that they shall give her a daily account of the work done by them. The provision that the nurse is to follow the instructions of the medical man in charge of the case has not the effect suggested by the defendants. Whether the nurse was to be regarded as the servant of the association, or as the servant pro hâc vice of the plaintiffs, in the work of nursing the patient, it is obvious that it would equally have been her duty as a nurse, and part of her work as such, to follow the instructions of the medical man in attendance; so that the regulation to the effect that she shall do so does not really shew that she was under the control of the plaintiffs, or acting as their servant, and throws no light on the question. No doubt the committee of the association, or their superintendent, cannot practically go to the patient's house and control or supervise the acts of the nurse there; but, so also, the directors of a railway company cannot practically supervise the management of the trains while running on different parts of their railway, and yet those who are actually engaged in managing them are the servants of the company for the purpose of rendering them responsible for negligence in such management.

The form sent with the nurse reserves to the association a right to withdraw the nurse at any moment. That right is inconsistent with the notion that the nurse was an independent contractor with the plaintiffs. That document cannot by itself constitute the contract, and must be read in connection with the regulations and other circumstances of the case. The mere fact that it speaks of the person to whom it is sent as the employer cannot be treated as conclusive, and it is submitted that, looking to the documents and other circumstances as a whole, it was a question for the jury what the contract of the association was, and the evidence justified their finding.

[They cited *Mersey Docks Trustees* v. *Gibbs* (1); *Rourke* v. *White Moss Colliery Co.* (2); *Jones* v. *Scullard.* (3)]

Montague Lush, K.C., for the defendants, in reply.

(1) (1866) L. R. 1 H. L. 93. (2) (1877) 2 C. P. D. 205.
(3) [1898] 2 Q. B. 565.

C. A. 1904

HALL v. LEES.

COLLINS M.R. This is a question of considerable public importance, inasmuch as it concerns a class of cases which must be of frequent occurrence, and in which the community at large are interested. The defendants are the committee of an association of persons, who from philanthropic motives have organized a system by means of which they are enabled to supply skilled nurses to persons who are in need of them, whether for the purposes of surgical operations, or in other cases of sickness. They supply nurses, apparently, both to persons who cannot afford to pay for them, and also to those who can. They appear to use great care in the selection of competent persons as nurses, and they pay the nurses selected salaries, by means of which they always have nurses at their disposal of whose qualifications they are assured. In the present case the person needing the nurses was able to pay for their services. Two nurses were needed to attend upon the male plaintiff's wife, who had to undergo a serious operation, and they were provided by the association. The operation was performed, and, immediately after it, one or other of the nurses appears to have carelessly applied a hot-water bottle to the patient, in such a way that she, being still in a state of insensibility from anæsthetics, was severely burnt before any one was aware of the mischief that was being done. In respect of the injury so occasioned to the female plaintiff the action is brought. The question is thereby raised, whether the association who supplied the nurse is responsible to the patient for the consequences of her negligence. That question in the last resort is a simple one, and depends, I think, upon the true effect of the contract between the association and the person to whom the nurse was supplied. If the association undertook to nurse the patient, then they are responsible for the failure of the person by whom they nursed her to use due care. If, on the other hand, they only undertook to supply a competent nurse to the patient, then, if they exercised ordinary care and skill in the selection of the nurse whom they supplied, their responsibility was at an end, and they were not responsible for her failure to exercise due care and skill. The question therefore is whether, under the circumstances of the case, and

having regard to the rules and regulations of the association and the other documents, the contract is to nurse the patient, or only to supply a nurse to the patient. To determine this question, it is necessary to examine the regulations under which the association conducts its business, and the forms used by them. Fortunately, the whole of the evidence on the subject appears to be contained in printed documents, and there does not appear to be any evidence of any verbal stipulation which could alter the inference that would otherwise arise from those documents. The case was tried before Jelf J. at Liverpool, and, in answer to a question left to them by the learned judge, the jury found that the defendants undertook to nurse the female plaintiff through the agency of the two nurses as their servants, and not merely to procure for her the services of two nurses. The question is whether that finding can be supported.

Under the circumstances the question seems to me to be, not one of fact for the jury, but really one of law for us—namely, what, upon the construction of the rules and regulations of the association and other documents, there being no dispute of fact involved, was the true nature of the contract entered into by the defendants? It appears to me clear, when the rules and regulations of the association and other documents are examined, that what the association undertook to do was merely to find and supply nurses, in selecting whom they had employed all reasonable care and skill in order to ensure their being competent and efficient. Some of the rules and regulations are important as shewing what the relations are between the association, and the nurses, and the persons to whom the nurses are supplied.

The object of the association is stated to be "to supply aid and instruction in skilled nursing by nurses located in Oldham in accordance with these rules and regulations." Regulation 6 makes provisions with regard to the superintendent, who is to be appointed by the house committee, and whose duties are (inter alia) to receive all applications for nursing service, and promptly to attend to the same, to control the work of the domestic servants, to superintend the work of the nurses, and

C. A. 1904

HALL v. LEES.

Collins M.R.

to devote what time she can command to nursing duties. Then regulation 7, which is headed "Nurses," provides that nurses shall be supplied to attend infectious cases and maternity nursing shall be undertaken, and that a proportion of nurses shall be reserved for non-infectious medical and surgical cases. It further provides that the nurses are to be appointed or discharged by the house committee in consultation with the superintendent, and shall be recommended for appointment by the superintendent to the house committee; and that for the termination of such appointment one month's notice shall be given on either side; also that any nurse who infringes the rules, or is guilty of misconduct, is liable to dismissal by the superintendent without notice, after consultation with the president or the doctor on the house committee, or one of the secretaries. With regard to the qualifications of nurses it provides that each nurse shall have had at least two years' training in a general hospital, and none shall be eligible for appointment who are over thirty-five years of age. Then it is provided that "each nurse shall be responsible to the superintendent, to whom she shall at once refer in a case of doubt or difficulty, and shall conform to her instructions in all matters pertaining to work and conduct, and shall give to her a daily account of work done, and pay each day to the superintendent any money received for nursing." Those regulations to which I have hitherto referred appear to be general regulations directed to the object of securing the efficiency and providing for the general supervision of the nurses. But then comes regulation 8, which makes provisions as to nurses when employed to attend a patient. It provides that each nurse, when engaged in weekly nursing, shall be allowed eight hours' sleep and two hours' leisure daily, and, when on duty, shall wear the uniform provided for her; and that, when a nurse is engaged in continuous nursing and sleeps at the home, she shall be allowed ten hours out of the patient's house, the time being arranged to suit the doctor attending. Then follow very important provisions, namely, that "when at a case the nurse shall not absent herself from duty without permission from the patient's friends"; and that "only such cases shall be

undertaken as are attended by a medical man, whose instructions the nurse must implicitly follow." Then there are regulations with regard to the charges to be made for the services of the nurses, and other matters.

I have referred at some length to these regulations for the purpose of putting forward as fairly as possible the materials upon which the case for the plaintiffs is based. Their counsel fastened on such of the regulations as provide for supervision of the nurses, and as to what they are and are not to do, and asked us to hold that they constituted the relation of master and servant between the association and the nurses while they were attending on a patient. I do not think that these regulations have the effect so contended for; I think they are really provisions, the object of which is to promote efficiency on the part of the nurses, and define the bargain between the association and them, and to ensure that the association shall be able to supply competent and efficient nurses when application for such is made to them. That is the character, I think, of these regulations. The relation between the nurse and the patient, when a nurse has been applied for and supplied, appears to me to be provided for by the later regulations, which I have read, one of which provides that nurses shall only be supplied in cases which are attended by a medical man, and that the nurse shall implicitly follow his instructions.

With regard to the machinery by which application was to be made to the association for the services of a nurse, it appears that, strictly speaking, application should, according to the usual practice, have been made by filling up a printed form, in which the name of the person applying for the nurse would have appeared. In this case it seems that the medical man, who was about to perform the operation, applied orally for a nurse with whose qualifications he was acquainted, but could not obtain her services, and that two other nurses were supplied. In accordance with the practice of the association, a printed form was sent with each of the nurses, which is of great importance in this case. It runs thus: "At the request of I send herewith Nurse to attend the case of"; and a form is annexed headed "Discharge and

C. A. 1904

HALL v. LEES.

Collins M.R.

Confidential Report to be returned twenty-four hours before the termination of the nurse's services." That form specifies a number of matters, a report as to which is to be filled in by the medical attendant, and which relate to the efficiency of the nurse. Then follows a space for a report as to the care and kindness of the nurse in attendance on the patient, and her general conduct, which is "to be filled in by employer." That document seems to me most distinctly to indicate to the person to whom it is sent that he is regarded as the employer of the nurse supplied, and is invited in that capacity to sign the report upon the matters therein mentioned.

Having regard to the documents to which I have referred, what was the obligation which the defendants had undertaken? Had they undertaken to nurse the female plaintiff, or merely to afford the plaintiffs the advantage of being able to apply to an institution where skilled nurses were procurable, and of being supplied by it with such nurses, who, when supplied, were to be subject to the orders of the medical man employed by the plaintiffs? To my mind the correct view of the contract is that the association merely undertook to supply competent nurses, who were to be under the orders of the patient's medical man and not the servants of the association, for the purpose of nursing the patient. Therefore, when the association sent the nurses, I do not think they were sending them to do in their place that which they had themselves undertaken to do. They never undertook, as it seems to me, to nurse the female plaintiff, but only to supply a competent nurse for that purpose.

It is not necessary to go at length through the authorities to which reference has been made, but I should like just to refer to some words used by Willes J., whose judgments always seem to me to go to the root of the matter in cases which he is discussing, in the case of *Murray* v. *Currie*. (1) In dealing with the question whether stevedores employed to unload a ship could be regarded as servants of the shipowner, he said: "The stevedores, however, are not the servants of the owner of the ship; but they are persons having a special

(1) L. R. 6 C. P. 24.

employment, with entire control over the men employed in the work of loading and unloading. They are altogether independent of the master or owner. In one sense, indeed, they may be said to be agents of the owner; but they are not in any sense his servants." Then he lays down this as the true test: "They are not put in his place to do an act which he intended to do for himself." So here, the nurse is not put in the place of the association to do work which they intended to do themselves, because they had not undertaken to nurse the female plaintiff, but only to supply a qualified person to nurse her under the control of her own doctor. Brett J. said in the same case, alluding to the fact that the man through whose negligence the accident occurred was one of the crew, whose services had been lent by the shipowner to the stevedore: "But I apprehend it to be a true principle of law that, if I lend my servant to a contractor, who is to have the sole control and superintendence of the work contracted for, the independent contractor is alone liable for any wrongful act done by the servant while so employed. The servant is doing, not my work, but the work of the independent contractor." So here, unless the association had undertaken to nurse the female plaintiff, the nurse was not doing their work while engaged in nursing her, and the relation of master and servant did not exist between them and the nurse for the purpose of that work, though possibly for other purposes it might exist. On these grounds I think that the application to enter judgment for the defendants should be allowed.

STIRLING L.J. I am of the same opinion. The question broadly stated is whether the association contracted to nurse the female plaintiff, or merely to supply properly qualified nurses for that purpose. In my opinion the latter was what they contracted to do. I think that, in dealing with this question, perhaps the most important document for consideration is the form which was sent with the nurses in answer to the application for nurses to the association through their superintendent. After stating certain conditions subject to which the nurse is sent, it states that "for the successful working of the

C. A. 1904

HALL v. LEES.

Stirling L.J.

association it is absolutely needful that the committee and lady superintendent should have an accurate knowledge of the conduct, capacity, and other qualifications of their nurses," and "it is therefore requested that the annexed form should be filled up correctly." Then we find that a form is annexed, which is headed, "Discharge and Confidential Report to be returned twenty-four hours before the termination of the nurse's services." A portion of this form is to be filled in by the medical attendant, and another portion, which relates to the care and kindness of the nurse in attendance on the patient and her general conduct, is "to be filled in by employer." That document appears to me on the face of it to import that the contract between the association and the person who has applied for the nurse is that the former shall supply a competent nurse, who, when supplied, is to be in the employment of the latter. The plaintiffs' counsel relied upon certain provisions of the rules and regulations of the association, to which I will not refer at length, as they have been already read by the Master of the Rolls. The greatest stress was placed on certain provisions of rules 7 and 8, such as that the nurse shall be responsible to the superintendent, to whom she shall at once refer in a case of doubt or difficulty, and shall conform to her instructions in all matters pertaining to work and conduct. These provisions are, it seems to me, part of the contract between the nurse and the association, and not of that between the association and the person to whom the nurse is supplied. Though the latter contract may reserve to the association certain rights of intervention with reference to regulations subject to which the nurse has been supplied, I do not think that it was ever intended by those regulations that, under the contract for the supply of the nurse, any power should be given to the association or their superintendent of interfering with the discharge by the nurse of her duties in nursing the patient as between her and the employer. That seems to me to be made clear by the subsequent regulations which provide that, when at a case, a nurse shall not absent herself from duty without permission from the patient's friends, and that only such cases shall be undertaken as are attended by a medical

man, whose instructions the nurse must implicitly follow. It was never intended I think that the regulations as to supervision of nurses by the superintendent, upon which the plaintiffs' counsel relied, should be applied so as to derogate from the subsequent regulations with regard to nurses when on duty, or from the rights conferred on the employer by the contract of employment, where a nurse has been employed to attend on a patient as in the present case. For these reasons I agree that judgment should be entered for the defendants.

MATHEW L.J. I am of the same opinion. It was argued for the plaintiffs that we ought to look to certain regulations of the association upon which they relied, in order to discover the terms of the contract between the plaintiffs and the association. I do not think that these regulations can be used for any such purpose. They were not, as it seems to me, framed for the purpose of indicating to persons applying for nurses the obligations of the association towards those persons. I regard this as a simple case of everyday occurrence. The condition of the female plaintiff required an operation of great severity. The medical man in whose charge she was, was asked to select nurses for the purposes of the operation. He might, of course, have procured nurses not connected with the association, and, if he had done so, it could not have been reasonably contended that he would have been liable for the nurse's negligence. Knowing of this association, which had been formed for the purpose of ensuring a supply of skilled nurses, and of instructing nurses in the efficient performance of their duties, he applied to them for a particular nurse whom he knew, but was not able to procure her services, and in the result two other nurses were sent. It appears to me that the effect of the documents to which reference has been made is that, as soon as those nurses entered upon their duties in nursing the female plaintiff under the control of the patient's medical attendant, they were for the purpose of these duties the plaintiffs' servants. I cannot doubt that the plaintiffs might in the first instance have refused to employ the persons sent, or that, if the plaintiffs had in the course of the employment

C. A. 1904

HALL v. LEES.

Mathew L.J.

been dissatisfied with the service rendered by the nurses, they might have dismissed them. If the contention for the plaintiffs were right, that would not be so: for the nurses would be acting as the servants of the association in performance of a contract by them to nurse the female plaintiff, and therefore would not be subject to dismissal by the plaintiffs. It appears from the regulations that the nurse is not entitled to absent herself from duty without the permission of the patient's friends; as soon as the nurse is placed in charge, she is subject to the orders of the doctor employed by the patient; and there is nothing in the rules which would entitle the association or any of their officers to follow her to the patient's house in order to control the manner in which her duties were carried out there. Again, the document referred to by the Master of the Rolls which was sent with the nurses to the plaintiffs appears to me to be consistent only with the view that the plaintiffs were the nurses' employers for the purpose of nursing the patient. For these reasons I think that no action will lie against the defendants in respect of the negligence of the nurse or nurses.

Application for judgment by the defendants allowed.

Solicitors for plaintiffs: *Jaques & Co., for John Armstrong, Oldham.*

Solicitors for defendants: *Field, Roscoe & Co., for G. S. Claydon, Oldham.*

E. L.

In re EVERSON.
Ex parte THE OFFICIAL RECEIVER.

1904
June 13.

Bankruptcy—Practice—Appeal from County Court—Leave to appeal—High Court—Jurisdiction—Bankruptcy Appeals (County Courts) Act, 1884 (47 & 48 *Vict. c.* 9), *s.* 2—*Bankruptcy Rules*, *r.* 129.

An appeal in bankruptcy cannot be brought from an order of a county court relating to property not exceeding 50*l.* in value except by leave of the county court, and the High Court cannot give leave to appeal when it has been refused by the county court.

APPEAL from an order of the judge of the county court at Newport, Monmouthshire.

The official receiver, as trustee in bankruptcy, applied to the county court judge for an order declaring that a payment by the bankrupt of 16*l.* was fraudulent and void. The county court judge dismissed the application, and refused leave to appeal. The official receiver thereupon (Wright J. being absent owing to illness) applied ex parte to Bruce J. at chambers for leave to appeal, and the learned judge gave leave to appeal.

E. W. Hansell, for the respondent. There is a preliminary objection to the hearing of this appeal. Rule 129, sub-rule 2, of the Bankruptcy Rules provides that, "except by leave of the Court no appeal to the Court of Appeal shall be brought from any order relating to property when it is apparent from the proceedings that the money or money's worth involved does not exceed 50*l.*" In that rule "Court" means the Court of first instance which has made the order, and "Court of Appeal" means the Court to which an appeal lies from that Court of first instance. In this case the "Court" is the county court, and the "Court of Appeal" is the Divisional Court: see rule 3 (*a*), and s. 2 of the Bankruptcy Appeals (County Courts) Act, 1884. By s. 168, sub-s. 1, of the Bankruptcy Act, 1883, "'the Court' means the Court having jurisdiction in bankruptcy under this Act." Therefore Bruce J.

1904

EVERSON, *In re.* OFFICIAL RECEIVER, *Ex parte.*

had no jurisdiction to give leave to appeal, and the appeal cannot be brought without the leave of the county court judge.

Muir Mackenzie, for the appellant. The decision of a county court judge who has wrongly refused leave to appeal in a bankruptcy matter is subject to review by the Divisional Court sitting to hear appeals in bankruptcy from county courts. By rule 134A, of the Bankruptcy Rules, "any order or direction incidental" to an appeal to the High Court from an order of a county court in a bankruptcy matter may be given by the judge of the High Court for the time being exercising jurisdiction in bankruptcy; and in the absence of Wright J. the judge at chambers could exercise that jurisdiction. Therefore Bruce J. at chambers had jurisdiction to make this order. An application for leave to appeal can be made ex parte, and therefore an appeal to the High Court from a refusal to give leave can be brought ex parte. An order has been made by Bruce J. which has not been appealed from, and this Court cannot now disregard or review that order.

E. W. Hansell, in reply, cited *Lane* v. *Esdaile*. (1)

BIGHAM J. I think that this preliminary objection must prevail. It appears that the order of the county court judge, from which this appeal is brought, related to property of the value of less than 50*l*. The case, therefore, comes within rule 129, sub-rule 2, which provides that, "except by leave of the Court, no appeal to the Court of Appeal shall be brought" from such an order. There "Court" means the Court of first instance, and "Court of Appeal" means this Court when the appeal is from a county court. The object of that rule is to prevent appeals in small and insignificant cases. This is, in my opinion, one of those cases, and the rule expressly provides that there shall be no appeal except by leave of the Court which makes the order. That leave has not been obtained, and therefore the condition precedent to the right to appeal has not been fulfilled. It has been contended that the refusal of leave to appeal by the county court judge is an order from

(1) [1891] A. C. 210.

which an appeal can be brought to the High Court, and that Bruce J. at chambers has heard such an appeal in this case, and reversed the refusal of the county court judge and given leave to appeal. I think that the refusal by the county court judge of leave to appeal is not an order from which an appeal can be brought, and I think that the order made by Bruce J. cannot supply the want of the condition precedent to the right to appeal which is provided by rule 129, sub-rule 2. This appeal must, therefore, be dismissed.

DARLING J. I am of the same opinion. Rule 129, sub-rule 2, says that this appeal cannot be brought "except by leave of the Court," and it is conceded that that means the Court of first instance. The appellant contends that, when leave to appeal has been refused, he can appeal from that refusal—that is, that he can appeal without the leave of the Court of first instance. If that were so, there would really be no meaning in the words "except by leave of the Court," for there would be an appeal in every case by asking for leave to appeal and, when it was refused, coming to the High Court.

Appeal dismissed.

Solicitor for appellant: *Solicitor to the Board of Trade.*

Solicitor for respondent: *F. Kinch, for Lyndon Moore & Co., Newport, Monmouthshire.*

W. A.

1904
June 20.

GWENDOLEN FREEHOLD LAND SOCIETY *v.* WICKS.

Industrial and Provident Society — Special Remedy for Debts due from "Members"—Determination of Membership—Industrial and Provident Societies Act, 1893 (56 & 57 *Vict. c.* 39), *s.* 23.

By s. 23 of the Industrial and Provident Societies Act, 1893, "All moneys payable by a member to a registered society shall be a debt due from such member to the society, and shall be recoverable as such either in the county court of the district in which the registered office of the society is situate, or in that of the district in which such member resides, at the option of the society."

Held, that where a member has contracted a debt to the society of an amount in excess of the ordinary jurisdiction of the county court, the society may recover it in the county court under the above section, although the debtor has ceased to be a member at the time of action brought.

Appeal from the Leicester County Court.

The plaintiff society was a society formed for the purpose of buying land and selling it in small allotments to its members, the purchase-money of the allotments being payable by the allottees in small fortnightly contributions. By rule 32 of the rules of the society it was provided that, if any member should be in arrear in payment of his contributions to an amount equivalent to the contribution of three calendar months, the committee of the society might by resolution declare that such member was no longer a member of the society, and that each allotment in respect of which such arrears should have accrued was forfeited to the society. But nothing in the rule was to preclude the committee from compelling payment by any member of any arrears notwithstanding such forfeiture. The society was registered under the Industrial and Provident Societies Act, 1893, in November, 1901. The defendant was a member of the society, and was the holder of several allotments. On October 18, 1902, being in arrear with his contributions in respect of those allotments, he was served with a notice requiring him to pay the arrears, and on November 25, 1902, the arrears due from him being considerably in excess of the contributions payable by him for three calendar months, the committee, in accordance with the

provisions of the above-mentioned rule, passed a resolution declaring him to be no longer a member of the society and his allotments to be forfeited. On February 16, 1904, the plaintiff society sued the defendant in the county court under s. 23 of the said Act for the amount of his contributions in arrear on October 18, 1902, together with the interest payable thereon under the rules, which together amounted to the sum of 136*l.* 11*s.* 11*d.* The county court judge gave judgment for the plaintiffs. The defendant appealed.

A. Neilson, for the defendant. The amount of the plaintiffs' claim being in excess of the ordinary jurisdiction of the county court, the action should have been brought in the High Court, unless s. 23 of the Industrial and Provident Societies Act, 1893, applies. But that section only applies when the defendant is still a member of the society at the date of the action. The society is given the option of suing in the county court of the district "in which such member resides." The word "resides" being in the present tense can only refer to the date of action brought, and the section expressly says that the person so residing must be a member.

C. B. Marriott, for the plaintiffs.

KENNEDY J. I think the county court judge was right. It is contended upon the construction of s. 23 that the right of the judge to entertain the action, to the extent to which it exceeded the ordinary jurisdiction of the county court, depended upon whether at the time when the action was launched the defendant's membership of the society still subsisted. But I do not think it was intended that the jurisdiction should be so limited. The word "member" in the section must be read as including past members as well as present.

DARLING J. I am of the same opinion.

Appeal dismissed.

Solicitors for plaintiffs: *Stileman & Neate.*

Solicitors for defendant: *Bennett & Ferris, for Bray & Price, Leicester.*

J. F. C.

1904
Feb. 24, 25.

ROBINSON *v.* BURNELL'S VIENNA BAKERY COMPANY, LIMITED.

Company—Debenture—Floating Security—Execution under Writ of Fi. Fa. against Company—Payment to Sheriff in order to avoid Sale—Title to Money in hands of Sheriff.

Judgment having been given in an action against a limited company, which had issued debentures giving a floating charge over all its property, the goods of the company were taken in execution under a writ of fi. fa. In order to avoid a sale and to enable them to continue to carry on business, the company, with the assent of the execution creditor, paid daily to the sheriff a certain sum out of their daily takings. Afterwards a receiver was appointed in a debenture-holder's action, who claimed to be entitled to the money paid by the company, which still remained in the hands of the sheriff and had not been handed over by him to the execution creditor:—

Held, that the true effect of the transaction was that the money was paid to the sheriff as part of the debt owing to the execution creditor, who was therefore entitled to retain it as against the debenture-holders.

Robson v. *Smith*, [1895] 2 Ch. 118, followed.

ARGUMENT of a question of law directed by Lawrance J. at chambers to be set down for hearing in Court.

It appeared that on February 23, 1903, the defendant company was registered as a limited company with a capital of 3500*l.* in shares of 1*l.* each. On February 27, 1903, five debentures of 100*l.* each were issued; they gave the usual floating charge upon the company's undertaking. The company did not prove successful, and the plaintiff brought an action against the company and recovered judgment and issued execution; and on October 24 the sheriff entered into possession of the defendant company's goods under a writ of fi. fa. An arrangement was made, with the assent of the execution creditor, by which the company, who were anxious to avoid a sale of their stock-in-trade, agreed with the sheriff that, in consideration of his not selling the goods seized by him, they would pay him 3*l.* 5*s.* a day out of the daily takings of the business, of which 5*s.* was to be for the sheriff's charges for possession; and this arrangement was duly carried out. On November 23 an order was

made by Farwell J. in a debenture-holder's action appointing a receiver and manager on behalf of the debenture-holders of the undertaking and property of the company. The sheriff had received, down to November 24, from the defendant company under the arrangement a sum of 81*l.* 5*s.*, of which 6*l.* 5*s.* represented his own charges, and on that day the receiver claimed on behalf of the debenture-holders the balance of 75*l.*, which was still in the hands of the sheriff. The sheriff then took out an interpleader summons, and upon the hearing the master decided against the receiver, and barred his claim; the receiver appealed to Lawrance J., who directed the question of law to be set down for hearing.

Gutteridge (*Colam* with him), for the receiver. At the date of the appointment of the receiver the property in the money was still in the company and had not passed to the execution creditor, for mere seizure under a writ of fi. fa. does not pass to the latter the property in the goods or money seized, which remain in the custody of the law until they, or their proceeds, are handed over to the execution creditor: *Collingridge* v. *Paxton* (1); *Union Bank of London* v. *Lenanton*. (2) That being so, the money in the sheriff's hands was covered by the floating charge in favour of the debenture-holders, and the receiver's claim is good. The floating charge crystallized when the sheriff went into possession, and the rights of the debenture-holders prevail against those of the execution creditor: *Davey* v. *Williamson* (3); *In re Standard Manufacturing Co.* (4); *In re Opera, Limited* (5); *Taunton* v. *Sheriff of Warwickshire*. (6)

Muir Mackenzie, for the execution creditor. This money does not stand on the same footing as goods which have been seized by the sheriff and are in custodia legis; no doubt in such a case the title of the debenture-holders would prevail, but the doctrine is inapplicable. The money was money paid as part of the debt in order to avoid a sale, and as such became

(1) (1851) 11 C. B. 683.
(2) (1878) 47 L. J. (Q.B.) 409.
(3) [1898] 2 Q. B. 194.
(4) [1891] 1 Ch. 627.
(5) [1891] 3 Ch. 260.
(6) [1895] 2 Ch. 319.

1904

ROBINSON v. BURNELL'S VIENNA BAKERY COMPANY.

on payment to the sheriff the money of the execution creditor: *Stock* v. *Holland* (1); *In re Pearson* (2); the payment stands on the same footing as payment in garnishee proceedings. *Robson* v. *Smith* (3) is a distinct authority that money so paid before the debenture-holders put their security in force is not subject to their claims. It is clear from that case that a company has an implied licence from the debenture-holders to carry on business in the ordinary course until a receiver is appointed, and a payment made in order to prevent the business coming to a standstill is a payment in the ordinary course of business. It is really a question of fact whether the money was paid as part of the debt or not. [He also cited *Simultaneous Colour Printing Syndicate* v. *Foweraker*. (4)]

Colam, in reply.

CHANNELL J. I have felt some little difficulty about this case, for I doubt whether it is exactly covered by any of the authorities which have been cited to me. I think, however, that the claim of the execution creditor must prevail over that of the debenture-holders. In my opinion the payment of 3*l*. a day (excluding the sheriff's charges) was a payment made to the judgment creditor on account of his debt in consideration of his not going on with the execution; and there is no doubt that the sheriff had the assent of the execution creditor to the arrangement; indeed he could not have made it without that assent. That being so, the money in the hands of the sheriff was money paid by the defendants as part payment of their debt to the plaintiff. The debenture-holders were the holders of a floating security over the assets of the company, and no doubt when the company's goods were taken in execution by the sheriff they were only seized subject to the equities attaching to them, and the title of the debenture-holders would have prevailed had it been perfected in time. I express no opinion upon the point whether, if the debenture-holder, or the receiver on his behalf, does not interfere until the execution is completed and the execution creditor has got the money in his own

(1) (1874) L. R. 9 Ex. 147.
(2) (1886) 3 Morr. 187.
(3) [1895] 2 Ch. 118.
(4) [1901] 1 K. B. 771.

hands, his interference would be too late; the question does not arise in the present case. What clearly happened in the present case was that there was part payment by the company, the execution debtors, on account of their debt made whilst they were still carrying on business and with the view of enabling them to continue to carry it on. It is true that the payments of instalments of their debt by the defendants were made under pressure of the execution that had been levied by the sheriff; but does that fact by itself bring into force the debenture-holder's security? Does it determine the licence to the company to carry on their business in the ordinary way so as to make the company's property the property of the debenture-holder, and to enable him to say that the instalments are being paid with his money? That is what must be made out in order to enable the debenture-holder to succeed in his claim, and it has not been made out to my satisfaction. I think that *Robson* v. *Smith* (1) is an authority for the proposition that if the money is paid in payment of a debt, or as an instalment of a debt, it does not signify if it is paid under pressure; and if that is a correct view of that decision, it covers the point which I should otherwise have had to thrash out for myself. I am clearly of opinion that the title of the execution creditor prevails over that of the debenture-holder.

Judgment for the execution creditor.

Solicitors for execution creditor: *Hatchett-Jones & Co.*
Solicitor for claimant: *A. H. Crickmay.*

(1) [1895] 2 Ch. 118.

W. J. B.

1904
May 19.

ROUSE *v.* DIXON.

Employer and Workman—Compensation—Claim made under the Workmen's Compensation Act, 1897—*Withdrawal of Claim—Subsequent Action under Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42)—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 2 (*b*).

A workman injured by accident in the course of his employment claimed compensation from his employer under the Workmen's Compensation Act, 1897, and filed a request for arbitration. The employer having filed his answer, the workman gave notice withdrawing his claim for compensation, and subsequently brought an action for damages under the Employers' Liability Act, 1880, in respect of the same accident:—

Held, that the claim made under the Workmen's Compensation Act, 1897, was not a bar to the subsequent action for damages under the Employers' Liability Act, 1880.

Appeal of the plaintiff from a decision of the judge of the Croydon County Court.

The action was brought to recover damages under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), for personal injury sustained by the plaintiff during his employment by the defendant. On September 8, 1903, the plaintiff was injured by accident while employed upon the erection of a building, and on September 30 gave notice of the injury to his employer, the defendant. On October 14 the plaintiff filed a request for arbitration under the Workmen's Compensation Act, 1897, and on October 26 the defendant filed his answer in which he set up the defence, among others, that the building did not exceed thirty feet in height, which was the fact. The plaintiff thereupon gave notice to the defendant that he withdrew his claim under the Workmen's Compensation Act, and on the day fixed for the hearing the county court judge made an order that the plaintiff should pay the defendant's costs.

On January 21, 1904, the plaintiff commenced an action for damages under the Employers' Liability Act, 1880. At the hearing the defendant raised the objection that the plaintiff, having previously made a claim under the Workmen's Com-

pensation Act, could not maintain this action, by reason of the provisions of s. 1, sub-s. 2 (*b*), of that Act. (1)

The county court judge held that the plaintiff was precluded from bringing this action, and gave judgment for the defendant.

The plaintiff appealed.

Broxholm, for the plaintiff. The learned county court judge was wrong in holding that the plaintiff had exercised an irrevocable option under s. 1, sub-s. 2 (*b*), of the Workmen's Compensation Act, by making a claim under that Act which he subsequently abandoned. That section does not enact that when once a workman has made a claim under that Act he is debarred from making any other claim either at common law or under any other statute. Its object is only to prevent the employer being made to pay twice over. The case of *Edwards* v. *Godfrey* (2), upon the authority of which the county court judge decided this case, only decided that, if a workman desires to claim under the Workmen's Compensation Act after he has failed in a claim made independently of that Act, he can only do so in accordance with the special procedure provided by s. 1, sub-s. 4, of that Act. In this case there was no decision upon the merits in respect of the first claim, which was abandoned.

[He was stopped by the Court.]

Griffith Jones, for the defendant. The Workmen's Compensation Act gives to a workman a new and additional remedy in respect of personal injury, and at the same time preserves

(1) Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), s. 1, sub-s. 2 (*b*): "When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid."

(2) [1899] 2 Q. B. 333.

1904

ROUSE v. DIXON.

any other remedy which he may have independently of that Act; but it provides, by s. 1, sub-s. 2 (*b*), that the workman must exercise his option as to which remedy he will pursue, and that means that, when he has exercised his option to claim compensation under that Act, he cannot afterwards pursue any other remedy which he might have independently of that Act. In *Edwards* v. *Godfrey* (1) it was clearly decided that, when once the option has been exercised, no other proceedings can be taken except as specially provided by s. 1, sub-s. 4. In Ireland the contrary has been decided in *Beckley* v. *Scott* (2); but the judgment in that case was not unanimous, and the decision is inconsistent with the judgment of the Court of Appeal in *Edwards* v. *Godfrey*. (1)

Broxholm, replied.

LORD ALVERSTONE C.J. In my opinion the objection taken by the defendant fails, and the county court judge ought to have entertained the action. But for the differences of opinion among the Irish judges in *Beckley* v. *Scott* (2) I should not have felt any difficulty. This is not an Act, as has often been said, which purports to deal in express terms with every case which may arise. It is an Act which creates an entirely new machinery for obtaining compensation which is not based upon any legal liability, though that was lost sight of in some of the earlier cases. I give my decision only upon the facts of this case. The accident occurred on September 8, and notice of injury was given on September 30; on October 14 a request for arbitration was filed, and on October 26 the defendant filed his answer. The main defence raised by that answer was that the building did not exceed thirty feet in height. The workman, being advised that in the face of that defence he could not succeed in his claim under the Workmen's Compensation Act, abandoned those proceedings and commenced this action under the Employers' Liability Act, 1880. It is now said that, because the workman admitted that he was wrong in taking proceedings under the Workmen's Compensation Act and abandoned the claim which he put forward

(1) [1899] 2 Q. B. 333. (2) [1902] 2 I. R. 504.

under that Act, any other right which he may have had has been taken away. It would require the very plainest direction of the statute to induce me to support such a contention. The Workmen's Compensation Act provides, by s. 1, sub-s. 1 (*b*), that "When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, take the same proceedings as were open to him before the commencement of this Act." The option of the workman, therefore, is to claim compensation under the Act, or to claim damages at common law or under the Employers' Liability Act. The section further provides that "the employer shall not be liable to pay compensation for injury to a workman both independently of and also under this Act." That seems to me to point out plainly what are to be the consequences of the exercise of his option by the workman. They are, that the employer is not to be liable to pay compensation more than once. That being so, it seems to me that, when a claim is made under the Workmen's Compensation Act which cannot be enforced because the case does not come within the Act at all, the right of the workman to make any other claim is not lost. At any rate, I am clearly of opinion that there is nothing in the Act to lead to the extraordinary result that, where a claim is made under the Act, but withdrawn before there has been any decision upon it, all other liability on the part of the master is thereby wiped out. In my opinion, the intention of the Act was only to prevent the master from being liable to pay twice over. It was contended that the decision in *Edwards* v. *Godfrey* (1) applied to prevent a workman from bringing a subsequent action in circumstances such as these. There the workman brought an action under the Employers' Liability Act which failed, and it was held that, under the provisions of s. 1, sub-s. 4, of the Workmen's Compensation Act, he must apply at once to the judge who tried the action to assess compensation under the Workmen's Compensation Act, and that he

(1) [1899] 2 Q. B. 333.

1904

ROUSE v. DIXON.

Lord Alverstone C.J.

could not at a subsequent date commence proceedings under that Act. I think the reasoning of the decision is to be found in this passage of the judgment (1): "That sub-section (s. 1, sub-s. 4), however, is in favour of the workman, and gives him a very great advantage where he has exercised his option and finds too late that he has exercised it in the wrong way; it gives him a locus pœnitentiæ, and enables the county court judge before whom the action is tried, if applied to by the plaintiff at the time, to assess compensation under the Act." The respondent relies upon an earlier passage in the judgment (1): "He has exercised his option in favour of bringing a common law action, which has failed. Having been defeated in this action, there would, but for the provisions of s. 1, sub-s. 4, have been an end of any claim by the respondent against the appellant in respect of the injury." That is clearly right, for the sub-section in terms gives the right to proceed under the Act as there provided. That decision is only upon sub-s. 4, and does not lay down any general principle or any such rule as that for which the respondent now contends, and is not to be extended to cases which do not come within it. To my mind, the reasoning of the decision in *Beckley* v. *Scott* (2) is unanswerable, and it is not inconsistent with *Edwards* v. *Godfrey*. (3) In my view s. 1, sub-s. 2 (*b*), recognises the liability of the employer under the common law or the Employers' Liability Act as still existing, and preserves that liability, and only prevents subsequent proceedings when a claim under the Workmen's Compensation Act has been carried through to a determination upon the merits. For these reasons I am of opinion that the county court judge ought to have tried this case, and that the appeal must be allowed.

WILLS J. I am of the same opinion. But for some expressions in the judgment in *Edwards* v. *Godfrey* (3) I should have thought there was no difficulty in this case. In *Edwards* v. *Godfrey* (4) A. L. Smith L.J. said, "he has exercised his option"; but he was referring to a case in which there had

(1) [1899] 2 Q. B. at p. 337.
(2) [1902] 2 I. R. 504.
(3) [1899] 2 Q. B. 333.
(4) [1899] 2 Q. B. 333, at p. 337.

been a real exercise of the option; he was not dealing with a case such as this, where there was no real exercise of the option, because, the building on which the accident happened not exceeding thirty feet in height, the case did not come within the Workmen's Compensation Act at all. If the workman, acting under a mistake, gives notice of a claim under the Workmen's Compensation Act, and then withdraws that claim, I think that no effective option has been exercised. The contention of the respondent is that when once a claim has been made, even by mistake, the workman has foregone and given up all his other rights. I think that contention is not well founded; there must be the exercise of an option where an option really exists, and not where it cannot exist. To my mind the reasoning of the decision of the Court of Appeal in Ireland in *Beckley* v. *Scott* (1) is entirely satisfactory. The Court were dealing, as we are here, with a case which was not within the Workmen's Compensation Act at all. In *Edwards* v. *Godfrey* (2) there is only one expression in the judgment which can be said to indicate any view that the plaintiff had exercised an option which was irrevocable when once it had been exercised, and that expression certainly does seem to indicate the view that the mere commencing of proceedings is a final exercise of the option which will prevent any other proceedings being taken. I think, however, that the observations of the Court of Appeal in Ireland upon that point are right, and that the substance of the decision in *Edwards* v. *Godfrey* (2) is that, s. 1, sub-s. 4, having provided a special procedure for cases in which an action, independently of the Workmen's Compensation Act, is first brought, that special procedure must be followed if a subsequent claim is made under the Act, and that no other right is preserved to the workman. I entirely agree with the judgment of the Lord Chief Justice.

KENNEDY J. I am glad to say that I do not feel obliged to differ in this case, although I have felt difficulty about it. I have felt pressed by the reasoning of the judges who were in the

(1) [1902] 2 I. R. 504. (2) [1899] 2 Q. B. 333.

1904

ROUSE v. DIXON.

Kennedy J.

minority in *Beckley* v. *Scott* (1), and still more by the trend of the reasoning in the judgment of A. L. Smith L.J. in *Edwards* v. *Godfrey* (2), although I agree that there was at most only an expression of opinion. Further, I have felt some doubt upon the fair and natural interpretation of the language of s. 1, sub-s. 2 (*b*), and a considerable difficulty in construing it otherwise than according to the contention of the respondent. In that sub-section it is provided that the workman may at his option do either of two things: he may either claim compensation under the Act, or he may take the same proceedings as were open to him before the Act. The language is not that he may at his option take proceedings which succeed either in obtaining compensation under the Workmen's Compensation Act, or in obtaining damages by means of proceedings which were open to him before the commencement of that Act, i.e., at common law or under the Employers' Liability Act. The words are, "may either claim compensation." In the provisions of s. 6 there appears to be an indication of the same principle of giving the workman an option to take either the one proceeding or the other. Still, as was pointed out in *Powell* v. *Main Colliery Co.* (3), the word "proceedings" is satisfied by merely giving notice of a claim under the Act; and it would certainly be very hard on the workman if he were barred from all other rights by anything short of a decision. It is quite possible to construe the Act as imposing only a unilateral restriction—that is, that there being a special provision with regard to a case which has failed at common law or under the Employers' Liability Act, the workman cannot then claim under the Workmen's Compensation Act except by following the special procedure provided by the Act. It is not impossible to construe s. 1, sub-s. 2 (*b*), as meaning that the option may be exercised unless and until a claim has proceeded to a decision, and that the only limitation in the sub-section is with regard to the converse case to the present. One would, indeed, be unwilling, unless obliged by the language of the statute, to hold that the Legislature intended to bar a work-

(1) [1902] 2 I. R. 504. (2) [1899] 2 Q. B. 333.
(3) [1900] A. C. 366.

man from all other rights if he had made a claim which he abandoned when it was clearly shewn that the case did not come within this Act. There was certainly nothing in the present case which could be called res judicata.

1904

ROUSE v. DIXON.

Appeal allowed. Leave to appeal. (1)

Solicitor for plaintiff: *David Gunnell.*
Solicitor for defendant: *Newton G. Driver.*

W. A.

ATTORNEY-GENERAL *v.* LONDON COUNTY COUNCIL.

1904
June 28.

Revenue—Income Tax—Payment of Interest of Money—Right of Debtor to deduct and retain Income Tax—Interest "paid out of Profits or Gains brought into Charge"—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 60, *No. IV., r.* 10—*Customs and Inland Revenue Act*, 1888 (51 & 52 *Vict. c.* 8), *s.* 24, *sub-s.* 3.

The defendants were in receipt of a large annual income derived from interest on loans and rents, and they were also possessed of certain land which they occupied themselves. They had from time to time under their statutory powers borrowed large sums of money, and in respect thereof had created capital stock, which stock and the dividends thereon were charged upon all their property, including the land occupied by them. The annual interest payable upon that stock was considerably in excess of the annual income received by them and of the annual value of the land occupied by them taken together; and the amount by which their income was insufficient to pay the interest on the stock they raised by means of rates:—

Held, that under the circumstances the defendants had no taxable income, and that when paying the interest upon their stock to the stockholders they were entitled to deduct and retain for their own use so much of the income tax upon that interest as was sufficient to recoup them the income tax paid by them, not only under Sched. D upon the income received by them from the interest on loans and from the rents, but also under Sched. A upon the land occupied by them.

TRIAL of information before Channell J.

The defendant council are the successors of the Metropolitan Board of Works. By the Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102), s. 4, the board, for

(1) See *Taylor* v. *Hamstead Colliery Co.*, [1904] 1 K. B. 838.

1904

ATTORNEY-GENERAL v. LONDON COUNTY COUNCIL.

the purpose of raising the loans authorized by certain Acts mentioned in the schedule thereto, were empowered to create capital stock, to be called the Metropolitan Consolidated Stock, and to be issued in such amounts and manner and subject to such conditions as the Treasury might approve. By s. 5, all consolidated stock created for the purposes of the said Acts or of any Act thereafter to be passed "and the dividends thereon, and the sums required for the redemption thereof, shall be charged indifferently on the whole of the lands, rents, and property belonging to the board" under the Acts above mentioned, "and on all moneys which can be raised by the board by rates under this Act and on the improvement fund ; and all moneys required for payment of the dividends on such stock and the sums required to be raised for the redemption of such stock as mentioned in this Act shall be raised out of the improvement fund and metropolitan consolidated rate as in this Act mentioned." By s. 22, for the purpose of paying the dividends on and redeeming the consolidated stock, the board were empowered from time to time to assess and raise a rate, to be called the metropolitan consolidated rate. By s. 26, for the purpose of paying the dividends on and redeeming the consolidated stock, there was established a fund called the consolidated loans fund.

By the said Act and various subsequent Acts the board and the defendant council were empowered to lend sums of money to divers local authorities, and it was thereby directed that the interest paid and principal repaid by the local authorities should be carried to the said consolidated loans fund. By s. 15 of the London Council (Money) Act, 1889 (52 & 53 Vict. c. 61), it was provided that the consolidated loans fund should, subject to regulations approved by the Treasury, be applied first in payment of dividends on the consolidated stock, and then in redeeming the said stock. And acting under the powers of the said section, the Treasury on February 19, 1891, approved a regulation to the effect that the account to be kept by the council of the loans fund should be divided into two parts, an income account and a capital account, and that there should be credited to the income account all interest received by the

council on loans granted and on investments made by them, and all rents, interest, and other annual income received by them into the consolidated loans fund, and that there should be debited to the income account all payments for dividends, interest, rents, and other payments properly chargeable to the income of the consolidated loans fund.

By the Customs and Inland Revenue Act, 1888, s. 24, sub-s. 3, "Upon payment of any interest of money or annuities charged with income tax under Sched. D, and not payable, or not wholly payable, out of profits or gains brought into charge to such tax, the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted, or of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge, as the case may be, and such amount shall be a debt from such person to Her Majesty and recoverable as such accordingly."

The board and the defendant council from time to time under the authority of divers Acts of Parliament raised large sums by the creation and issue of consolidated stock, and have paid interest on such stock to the holders thereof. The defendants have also lent large sums to local authorities, the interest on which has been paid into the consolidated loans fund, and credited in accordance with the Treasury regulations to the income account of the said fund. The interest so received from the local authorities as aforesaid was received after deduction of income tax on the same by the said local authorities respectively under the provisions in that behalf contained in the Income Tax Acts. The defendants have also received after similar deduction of income tax, and credited to the income account of the consolidated loans fund, certain rents and other annual income properly falling to be credited to the said income account. Further sums derived from the consolidated rate, and not charged or chargeable with income tax, were also paid into the consolidated loans fund and credited to the income account thereof.

1904

ATTORNEY-GENERAL v. LONDON COUNTY COUNCIL.

The interest paid by the defendants to their stockholders for the year ending March 31, 1901, amounted to 1,371,633*l.* 6*s.* 9*d.*, on which, pursuant to s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888, they deducted income tax before paying it. The annual income derived by the defendants during the said year from interest on loans, rents, and other income taxed for income tax under Scheds. A and D amounted to 837,728*l.* 10*s.* 5*d.* The amount derived from the consolidated rate during that year and credited to the income account of the consolidated fund was 533,904*l.* 16*s.* 4*d.* Of the income tax on the interest of the consolidated stock so deducted by the defendants, they claimed to retain so much as would recoup them, not only the income tax paid by them on the 837,728*l.* 10*s.* 5*d.*, but also the tax paid by them under Sched. A upon certain land which was in their occupation, and which was assessed to income tax under Sched. A at an annual value of 118,306*l.* 6*s.* 1*d.* For the income tax deducted in respect of 415,598*l.* 10*s.* 3*d.*, the balance of the interest paid on the consolidated stock, the defendants admitted that they were accountable to the Commissioners of Inland Revenue. The Attorney-General claimed that the defendants were not entitled to retain any portion of the tax so deducted to recoup themselves for the tax paid on the 118,306*l.* 6*s.* 1*d.*

Sir Robert Finlay, *A.-G.*, and *Rowlatt*, for the Crown. To entitle a person paying annual interest charged with income tax to retain any portion of that tax for his own use, the interest must be "paid out of profits or gains brought into charge." To satisfy the provisions of s. 24, sub-s. 3, of the Act of 1888, it is not enough that the interest should be payable out of profits or gains brought into charge, in the sense that the interest is charged upon those profits; it must be in fact paid out of them. Here, to the extent of the 118,306*l.* 6*s.* 1*d.*, the interest has not been paid out of moneys chargeable to income tax, for that sum represents the annual value of land, which, by reason of its being occupied by the owners, yielded no profits available for the payment of interest.

The interest in question has been paid out of the rates which are not chargeable to income tax. The payment of the interest was, it is true, charged upon the land; but that is not enough. The difficulty arises from the fact that the income derived from rates is not subject to income tax. If the defendants' income was sufficient to pay the interest without resort being had to the rates, they would have to pay over to the Crown the amount of the tax on that interest, and also the annual value of the premises occupied by them without any deduction. Why, then, should they be in a better position, or the Crown worse off, because they have to exercise their power of rating to make up the deficiency in the interest? If a man has property which is mortgaged and which he occupies himself, and he pays the interest on the mortgage out of other income which he has, if that other income is taxable, he may retain the tax which he deducts out of the mortgage interest for his own use, for in such case he collects it on his own account, and not as agent for the Crown; it is otherwise where, as here, the interest is paid out of income which is not taxable. Thus, if the debtor having no available income for the payment of interest pays it out of capital, it is clear that he cannot retain the tax for himself. The object of s. 24, sub-s. 3, of the Act of 1888 was to get rid of a slip in the legislation made in s. 40 of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), which authorized a person paying annual interest to "deduct and retain thereout" the amount of the duty, and made no provision for such person's accounting to the Crown in cases in which the interest was paid out of income not brought into charge. The defendants' contention disregards the alteration in the law made by the Act of 1888. They rely on s. 60, No. IV., rule 10, of the Income Tax Act, 1842, which provides that "Where any such lands are subject or liable to the payment of any rent-charge or annual payment thereupon reserved or charged the owner or proprietor being also occupier and charged to the said duties shall deduct and retain out of every such annual payment as aforesaid" the amount of the tax on the annual payment. But that rule does not apply here; it is dealing with

1904

ATTORNEY-GENERAL v. LONDON COUNTY COUNCIL.

the distribution of the tax under Sched. A, and has nothing to do with the tax under Sched. D.

Sir Edward Clarke, K.C., Dickens, K.C., and *Ryde*, for the county council. The case falls exactly within the terms of s. 60, rule 10. The consolidated stock and the dividends are charged indifferently on the whole of the property of the council. The premises occupied by them are liable to the payment of the interest. And in such case, the owners being occupiers are entitled to deduct and retain a proportionate amount of the tax. The Crown will not by reason of such retention lose the tax, for it has already received it under Sched. A; whereas if the defendants are not entitled to retain the amount claimed the Crown will get the tax twice over, once under Sched. A and once under Sched. D, in respect of the same property. The interest on the stock is "paid out of profits and gains brought into charge" within the meaning of s. 24, sub-s. 3, of the Act of 1888—it is charged upon the land, and the annual value of the land is profit and is taxed as such; and it is in substance partly paid out of that profit. It can make no difference in substance whether the council let the land or occupy it themselves.

Rowlatt, in reply.

CHANNELL J. The facts of this case may be shortly stated thus: The London County Council have property which produces an annual income receivable by them in cash amounting for the year ending March 31, 1901, to 837,728*l.* 10*s.* 5*d.*, and upon that income income tax is duly paid. Then in addition they have certain property which they occupy themselves, being of the annual value of 118,306*l.* 6*s.* 1*d.*, and upon which income tax is paid under Sched. A. Those two sums together constitute the total annual value of their property, and amount to 956,034*l.* 16*s.* 6*d.* In addition to that they have a large source of income in their power of rating which is practically unlimited. Then the council have borrowed a large sum of money, the annual interest in respect of which is 1,371,633*l.* 6*s.* 9*d.*—a sum which largely exceeds the total annual value of their property—and in order to pay that interest they have, to the

extent to which it exceeds their cash income, to resort to their power of rating to make up the deficiency. Upon that 1,371,633*l.* 6*s.* 9*d.* the Crown is, of course, entitled to income tax. The county council deduct the income tax upon the entire interest which they pay, and for the tax on that portion of it which exceeds the total annual value of their property—that is to say, on 415,598*l.* 10*s.* 3*d.*—it is admitted that the council are accountable to the Crown, as having collected it from the stockholders on the Crown's behalf. The question is whether they are further accountable to the Crown for any other portion of the tax deducted by them beyond that on the 415,598*l.* 10*s.* 3*d.* The House of Lords have already held (1) that they are not accountable for so much of the tax deducted as is equal to the income tax already paid in respect of the 837,728*l.* 10*s.* 5*d.*, and the question which I have to decide is whether they are accountable for the residue—that is to say, the tax upon 118,306*l.* 6*s.* 1*d.*—or whether they are entitled to retain it to recoup themselves for the tax which they have paid to the Crown upon that sum under Sched. A. The answer to that question turns upon the interpretation of certain sections of the taxing Acts; but the House of Lords have held that those statutes are to be approached from the broad point of view that income tax is a tax upon income, and that though practically all income (with rare exceptions) is taxable once, it is taxable once only. A person who has property which produces an income, but is incumbered to the full amount of the income produced, pays no income tax in respect of it. He pays it no doubt in the first instance, but he deducts it from that which he pays to the incumbrancer; and therefore, having no real income, because his debts exceed his income, he pays no tax in the end. That is the principle which underlies these taxing Acts. Now, in the case of property coming under Sched. A, the tax is payable upon the annual value of the property if the owner occupies it, or if he does not occupy it upon the annual receipts, which would in practice be the same amount. And if a person has property taxed under Sched. A which is mortgaged, he is entitled by s. 60, No. IV., rule 10,

(1) *London County Council* v. *Attorney-General*, [1901] A. C. 26.

1904

ATTORNEY-GENERAL v. LONDON COUNTY COUNCIL.

Channell J.

of the Act of 1842 to deduct and retain the tax upon the annual charge upon the property. He is entitled to do so both when he occupies the property himself and also when he does not occupy it, but receives rent for it. When he occupies the property himself, it is obvious that he cannot pay the annual charge out of the actual receipts from the property, for there are none. He therefore pays it, if he pays it at all, from other sources. But he is entitled to deduct the tax upon the annual charge that he pays independently of the source from which he finds the money to pay it. In all ordinary cases the source from which he pays it is some other income which is itself taxable for income tax, and in such cases no difficulty arises. In the present case the difficulty arises from the fact that the county council have this exceptional power of raising income by the rates, which source of income is not taxable. But, as I have said, the deduction which under rule 10 the mortgagor is entitled to make from the payment to the mortgagee is irrespective of the question as to where he gets the money from wherewith to pay him; and the reason why he is entitled to make the deduction and retain it for his own use is that he has really no taxable income out of the property, except to the extent, if any, by which the value of the property exceeds the value of the charge. He is allowed to retain it because the real person who has the income arising out of the property and who ought to be taxed in respect of it is the mortgagee, and not the person whose ownership of the property is only nominal. Apply that to the present case. The London County Council have really no available income other than their power of rating the metropolis. The property which they have, the 837,728*l.* 10*s.* 5*d.*, is clearly charged with the payment of the 1,371,633*l.* 6*s.* 9*d.*, and it is in fact paid away in discharging that debt so far as it will go, for they are bound to apply their annual income in the first place in paying the annual charges, and are specially directed to do so by the Treasury Regulation of February, 1891. But as to the 118,306*l.* 6*s.* 1*d.*, which is the value of the property occupied by the council, I have to consider into which category it falls. There is undoubtedly considerable difficulty about the matter, owing to the change of

expression in s. 24 of the Act of 1888 from "payable" in the beginning of the section to "paid" in the latter part, for I do not see that I can say that the 118,306*l.* 6*s.* 1*d.* which is paid to the stockholders is in fact paid out of the annual value of this land; it is not so paid, because the annual value of the land is not received in cash, the land being occupied. It is received, if I may say so, in kind, for if the council did not occupy the land themselves they would have to rent other property elsewhere, and would have to raise an equivalent sum out of the rates to pay for it. They pay their 1,371,633*l.* 6*s.* 9*d.* of interest by paying away the 837,728*l.* 10*s.* 5*d.* which they receive as income, and by raising the balance of 533,904*l.* 16*s.* 4*d.* out of the rates. That latter sum is made up of the 415,598*l.* 10*s.* 3*d.* and the 118,306*l.* 6*s.* 1*d.* The 415,598*l.* 10*s.* 3*d.* there is no question about here. The 118,306*l.* 6*s.* 1*d.* is a sum which they in fact raise out of the rates and then apply in payment of so much of the interest on their stock. But I think you must look at the substance of the matter, and in substance they raise that 118,306*l.* 6*s.* 1*d.* out of the rates to pay for the land in question which they have to occupy for the purposes of their duties. The land in question has really no value to them if it is charged to the full amount. And it is clear that the statutes authorizing the borrowing of the money and the issue of the consolidated stock charge it on the council's property including the land so occupied. It seems to me that the council are precisely in the position of an ordinary mortgagor in possession of land which is mortgaged to its full annual value. He finds the money elsewhere to pay the mortgage interest. So here the county council find the money elsewhere to pay this 118,306*l.* 6*s.* 1*d.* to their stockholders. The only distinction between the two cases is that the private mortgagor has to find the money out of other income which pays income tax, whereas the council have to get it from a non-taxable source, namely, the rates. But in my opinion that distinction is immaterial, and does not affect the case. The Crown's power of taxing is only to tax for the amount by which the annual value of the property exceeds the annual interest on the money borrowed and charged on the

1904

ATTORNEY-GENERAL v. LONDON COUNTY COUNCIL.

Channell J.

property. I think you must look at this matter in the way in which the House of Lords looked at it, from the point of view of the substance of the thing; and the substance of it appears to be this—that the London County Council have no income on which they are liable to income tax, neither the income which they actually receive and pay away as interest to their stockholders, nor the annual value of the property which they occupy and which is charged to the full amount of its annual value. As I have already said, I think they must be taken to find the money to pay for their occupation of the land out of the rates, and then to apply the sum equal to the value of it towards the payment of the interest charged upon it. If the Crown's contention was right it would get the tax upon the value of the land twice over. It already gets it under Sched. A, and is now claiming to get it over again by collection from the stockholders in the same way that they get the tax upon the 415,598*l.* 10*s.* 3*d.* I am of opinion, therefore, that the council, having no taxable income, are entitled to retain so much of the tax which they collect from the stockholders as is sufficient to recoup them for the entire amount of the income tax which they pay, as well that which they pay under Sched. A for the property which they occupy, as that which they pay under Sched. D on the 837,728*l.* 10*s.* 5*d.* There must be judgment for the defendants.

Judgment for the defendants.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitor for defendants: *W. A. Blaxland.*

J. F. C.

TRUSTEES OF THE MARY CLARK HOME *v.* ANDERSON.

1904
June 29, 30.

Revenue—Landlord's Property Tax—Inhabited House Duty—Exemptions—"Almshouse"—"House provided for the reception or relief of Poor Persons"—Home for Ladies in Reduced Circumstances—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 61, *r.* 6—*House Tax Act*, 1808 (48 *Geo.* 3, *c.* 55), *Sched. B, Case IV.*

A home for ladies in reduced circumstances was founded and endowed by a lady, who conveyed it to trustees in fee simple on trust to appropriate and use it for that purpose. The inmates were to be ladies of fifty years old or upwards, possessed or in the actual enjoyment of a fixed yearly income of not less than 25*l.* and not more than 55*l.* Each inmate was entitled to the use of the common room, and to the exclusive use of an unfurnished bedroom and sitting-room, and to be supplied with coals, gas, and attendance free of cost; the inmates provided their own furniture, food, clothing, washing, and medical attendance; the food was cooked and served by the staff. The income of the endowment fund was applied to the payment of salaries, servants' wages and board, repairs, upkeep of fabric and of household and cooking utensils, and in providing gas and coals for the inmates and staff. There were no subscriptions to the home from the public:—

Held, that the institution was exempt from landlord's property tax and inhabited house duty, as being an "almshouse" within the meaning of 5 & 6 Vict. c. 35, s. 61, r. 6, and a "house provided for the reception or relief of poor persons" within 48 Geo. 3, c. 55, Sched. B, Case IV.

CASES stated by Commissioners of Income Tax on appeal by the trustees of the Mary Clark Home against assessments made upon the trustees under Sched. A, and also against assessments for inhabited house duty for the years ending April 5, 1902, and April 5, 1903.

From the statements in the case on appeal against the income tax assessment it appeared that the Mary Clark Home was an institution founded and endowed by Mrs. Eliza Jane Clark in memory of her mother Mrs. Mary Clark, and was conveyed to the trustees in fee simple by deed dated July 29, 1901, upon trust and to the intent and in order that the same hereditaments might at all times thereafter be appropriated and used as and for a home or institution to be called "The Mary Clark Home" for ladies in reduced circumstances, and under such rules and

1904

MARY CLARK HOME (TRUSTEES OF) v. ANDERSON.

regulations for the establishment and management thereof and of the intended endowment fund mentioned in the deed as the trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of the deed, or in case of difference the majority of them, should from time to time (but during the lifetime of Eliza Jane Clark with her concurrence) approve of and frame, or create, alter, or amend. The material rules were as follows :—

"(1.) The home or institution shall be a home for ladies in reduced circumstances.

"(2.) A person to be an inmate must be (*c*) Fifty years old or upwards. (*d*) The unmarried daughter or sister or the widow of a man who has been engaged in some professional or mercantile pursuit. (*e*) Possessed or in the actual enjoyment of a fixed yearly income of such amount as the board of management shall from time to time determine, and unless and until the board of management determine to the contrary a fixed yearly income of not less than 25*l*. or more than 55*l*." [No determination has yet been made to the contrary.]

"(3.) In the selection of inmates preference shall be given to ladies residing in Liverpool, or being unmarried daughters or sisters or widows of men who have been engaged in a professional or mercantile pursuit in Liverpool."

"(8.) Each inmate shall be entitled at the discretion of the board of management to the use of the common room or rooms with the other inmates, and to the exclusive use of such one room (a bedroom and sitting-room combined) unfurnished, or of two such rooms (a bed and sitting room) unfurnished, as shall from time to time be assigned to her, and to be supplied with coals, gas, and attendance free of cost while occupying such room or rooms."

"(10.) Each inmate shall provide her own furniture, food, clothing, and washing, and medical attendance."

The endowment fund, consisting of India stock, &c., brought in 422*l*. a year without deducting income tax. There were seventeen inmates, and a staff consisting of a lady superintendent, four female servants, and a gardener two days a week. The

said Eliza Jane Clark furnished the hall and staircases, common rooms, the lady superintendent's and servants' rooms, and the kitchens, and provided linen, glass, china, and cooking and household utensils, and the trustees maintained the same. The trustees applied the income of the endowment fund in paying the lady superintendent's salary and board, servants' wages and board, gardener's wages, rates, repairs, upkeep of fabric, and of linen, glass, china, and cooking and household utensils, and in providing gas and coals for the inmates and staff. There were no subscriptions to the home from the public. Each inmate provided the furniture for the room or rooms assigned to her, and food, clothing, washing, and medical attendance out of her own income, but the food was cooked and served by the staff.

The appellants contended—(1.) that as the object of the home was a charitable one, and as it was wholly supported by the endowment fund, it was a hospital or almshouse in the fullest and most proper sense of the words used in the Income Tax Act, and within the meaning of those words as given in all standard dictionaries, and therefore came within the allowance mentioned in paragraph 2, No. 6, following s. 61 of the Income Tax Act, 1842; (2.) that the home was an institution practically of the character of a hospital and was of an eleemosynary character, and came within the exemption, citing *Cawse* v. *Nottingham Lunatic Hospital* (1) in support of this contention; (3.) that the objects of the institution were "poor," which word was incapable of accurate definition and was not confined to persons in the lowest degree of poverty; that there were none so poor as those who have seen better days and fallen from comfort and easy means, and that the institution supplied these aged ladies in reduced circumstances with a home and fire, light, and attendance, and was therefore a hospital and of an eleemosynary character.

The respondent contended that the home was not a hospital within the meaning of the exempting clause relied on by the appellant, having regard to the fact that, although it was erected by private benevolence, yet it was in effect maintained by the

(1) [1891] 1 Q. B. 585.

1904

MARY CLARK HOME (TRUSTEES OF) v. ANDERSON.

inmates themselves, the endowment sufficing to keep the building in repair and to provide each inmate with coals, gas, and attendance only, and having regard to the rules laid down for the management of the home; (2.) that under the rules it was evident that the home was not a hospital in the sense of a place appropriated to the reception of persons sick or infirm in body or mind, nor an almshouse for the reception and maintenance of poor persons, that the inmates were all able to supply their wants without the home, that is, those necessaries of life which without including luxuries would suffice to maintain them in comparative comfort, that the inmates were not in the home at the expense of charity but by virtue of their own or their friends' money, that a free building did not per se make either a hospital or an almshouse, and that the inmates were not poor; neither were they mentally or physically incapacitated. He cited *Musgrave* v. *Dundee Royal Lunatic Asylum*. (1) He further contended that the home was not founded simply for the necessitous poor, sick, infirm, or aged, but was rather a home for ladies of limited incomes in which they might enjoy greater comfort and more congenial society than if they were living alone.

The Commissioners decided that the appellants were not entitled to the exemptions claimed. The question for the opinion of the Court was whether the Mary Clark Home was a hospital or almshouse entitled to exemption from the duties charged under Sched. A of the Income Tax Acts.

The case as to inhabited house duty stated the same facts and similar contentions, except that the claim was for exemption from house duty under Sched. B, Case IV., of 48 Geo. 3, c. 55, and that upon the meaning of "charity" and "house provided for the reception or relief of poor persons" reference was made to *Blake* v. *Mayor of London* (2) and *Southwell* v. *Royal Holloway College*. (3) The Commissioners decided that the appellants were not entitled to the exemptions claimed; and the question for the opinion of the Court was whether the Mary Clark Home was a hospital or house provided for the

(1) (1895) 22 R. 784. (2) (1887) 18 Q. B. D. 437; 19 Q. B. D. 79.
(3) [1895] 2 Q. B. 487.

reception or relief of poor persons entitled to exemption from the duties charged under the Inhabited House Duty Acts. (1)

Austen-Cartmell, for the appellants. The constitution of this home as set out in the case brings it, as being a "hospital" or "almshouse," within the exemptions in s. 61, No. 6, paragraph 2, of the Income Tax Act, 1842. It is a hospital or house provided for the relief of poor persons. It is not self-supporting, and the inmates only find their furniture and pay for their food. The word "poor" is a relative term, and for the purposes of the Acts relating to the revenue is not equivalent to a person in receipt of parochial relief: *Attorney-General* v. *Wilkinson* (2); it should be construed in a wide and elastic sense. The definitions of "hospital" and "almshouse" in the standard dictionaries support this view. The decided cases shew that the true test is whether the institution is or is not self-supporting. In *Needham* v. *Bowers* (3) the sums received from paying patients were sufficient to cover the expenses of non-paying patients; and it was held that as the institution as a whole was self-supporting it was taken out of the exemptions, Charles J. in his judgment distinguishing it from institutions "supported wholly or in part by charity"; the present institution is in part supported by charity within the meaning of that judgment. In *Cawse* v. *Nottingham Lunatic Hospital* (4) the same test was applied, and in *Musgrave* v. *Dundee Royal Lunatic Asylum* (5) the judgments followed the reasoning in

(1) Rule No. 6, contained in s. 61 of 5 & 6 Vict. c. 35, specifies the allowances to be made in respect of the said duties in Sched. A, which allowances are (inter alia) as follows: "For the duties charged on any hospital, public school, or almshouse in respect of the public buildings, offices, and premises belonging to such hospital, public school, or almshouse, and not occupied by any individual officer or the master thereof, whose whole income, however arising, estimated according to the rules and directions of this Act, shall amount to or exceed 150*l.* per annum, or by any person paying rent for the same, and for the repairs of such hospital, public school, or almshouse, and offices belonging thereto, and of the gardens, &c.; . . . "

By 48 Geo. 3, c. 55, Sched. B, Exemptions, Case IV., "Any hospital, charity school, or house provided for the reception or relief of poor persons" is exempt from the inhabited house duty.

(2) (1839) 1 Beav. 370; 49 R. R. 385.

(3) (1888) 21 Q. B. D. 436.

(4) [1891] 1 Q. B. 585.

(5) 22 R. 784.

1904

MARY CLARK HOME (TRUSTEES OF) v. ANDERSON.

Needham v. *Bowers*. (1) Quâ the Income Tax Act, this institution is within the meaning of "almshouse," for it is of an eleemosynary character and not self-supporting; if not an "almshouse," it falls within the wider meaning of hospital.

Rowlatt (*Sir R. B. Finlay, A.-G.*, with him), for the respondent. This institution is neither a "hospital" nor an "almshouse." For the purposes of Acts affecting the revenue no assistance is derived from consulting dictionaries, which necessarily give all the literary meanings of the words. It is not a "hospital"; that word is used in the section in the ordinary modern meaning, which connotes an institution primarily used for the relief and treatment of sickness and infirmity. And the judgment of Charles J. in *Southwell* v. *Royal Holloway College* (2) shews that it is not a "house provided for the reception or relief of poor persons" or an "almshouse." An "almshouse" is necessarily an institution of an eleemosynary character. The real question for determination is whether these ladies are poor persons, and it is in all such cases a question what is the degree of poverty and what the degree of relief. The private income necessary to entitle them to the benefits of the institution shews that they are far removed from a state of poverty, the object being to enable those who are only relatively poor to live with some approach to refinement.

Austen-Cartmell, in reply.

June 30. CHANNELL J. These cases raise practically the same point, which is whether an institution, known as the Mary Clark Home, is entitled to the qualified exemption in respect of income tax (or property tax, as it is more commonly called in the case of buildings) contained in s. 61, No. 6, of the Act of 1842, and to the exemption from inhabited house duty contained in Sched. B of the Act of 1808. The exemptions are in nearly the same words, and so far as regards this institution may be taken as practically identical. The exemption in the case of income tax seems rather wider than that in the case of the inhabited house duty, so far as regards institutions

(1) 21 Q. B. D. 436. (2) [1895] 2 Q. B. 487.

which are devoted to educational purposes; but they are, I think, identical in the case of hospitals, using the word in the modern sense of institutions for the relief of the sick. Coming to the class of exemption that is material to the present case—that is, institutions for the relief or assistance of persons suffering not physically from sickness or from mental infirmity, but simply from poverty—the exemptions seem practically the same, although the language used is not identical. The more important word in the income tax exemption is "almshouse," and in the inhabited house duty "house provided for the reception or relief of poor persons." In one of the definitions which have been referred to in argument "almshouse" was interpreted in almost the precise words used in the Act conferring the exemption from house duty, and in all the definitions the language used was very similar; I think, therefore, that I am justified in treating the word "almshouse" as being for all practical purposes equivalent to a "house provided for the reception or relief of poor persons." If that is so, the exemptions in the two Acts become identical.

So far as regards anything which may be gathered from the objects and policy of the Acts, I do not think there is much difference between them. It is perhaps somewhat easier to extract something like a principle out of the Income Tax Acts than out of the Inhabited House Duty Act. The Income Tax Acts deal generally with taxes upon income, and this particular form of tax (Sched. A) is a tax upon income arising from real property, for under it rents are taxable, and it includes cases where the owners of real property enjoy the annual value, as it were, of their property by occupying it themselves instead of getting rent for it; they take it, as it were, in kind. It is therefore a little easier to extract something like a principle from the cases of exemption from income tax, because they may be supposed to include and cover cases where practically there is no income arising from the occupation, or nothing analogous to income arising from the occupation. I do not think that much stress can be laid on that fact. It is clearly settled law that the fact that a person is a mere trustee, and

1904

MARY CLARK HOME (TRUSTEES OF) v. ANDERSON.

Channell J.

bound to devote to particular purposes any proceeds of the property of which he is trustee, does not of itself prevent the property being taxable or rateable in his hands any more than if he were a beneficial occupier. But although that is the case as regards the incidence of the tax, I think that when we consider express exemptions we may get a little light from the fact that the probable intention of the exemption is to relieve institutions from such a tax as income tax in cases where it is obvious that the persons assessed—in the present case the trustees of this institution—will be paying the tax out of funds which they are bound to devote to charitable purposes, thereby diminishing the amount which would otherwise go to those charitable purposes, and, therefore, in substance paying it out of the pockets of the objects of the charity. In substance, therefore, in cases where there is a charitable institution for the relief of poor persons or of sick persons, or for educational purposes, the imposition of the tax would mean the taxation of the poor or sick persons, or of the children who were being educated, and it was probably thought that this would be undesirable. I need say no more about the object of these Acts, and I have said so much only because where we find ambiguous words—as we undoubtedly do in the present case—the proper course in interpreting them is to consider the statute in which they appear and the purpose for which they are used. I think, however, that such words as "hospital" and "public school" might bear a very different interpretation in an Act like the present from that which they would bear (to mention a statute incidentally referred to during the argument) in the London Building Act. I need say no more upon the general considerations which arise in reference to these exemptions, which, as I have said, do not throw any great light on the matter.

The case is one in which probably as satisfactory reasons could be given for coming to a conclusion in favour of the one side as of the other. The question turns mainly, I think, upon the meaning of the word "almshouse." My attention has properly been drawn to the word "hospital," but it does not seem to me to be necessary to decide whether in these Acts

of Parliament the latter word has its older and wider meaning, or whether it is used only in the modern and restricted sense. No doubt it is now generally used solely in the sense of an institution for the relief of the sick suffering from physical ailments or physical injuries. No great while ago, at any rate in the time of Lord Coke, the word included institutions for the relief or alleviation of mere poverty, and certainly of the aged. There is an even older and wider meaning than those referred to during the argument, in which the word means little more than a resting-place or guest's place; it is, however, clearly not used here in that very wide sense, and whether it is used in the sense that includes institutions for the relief of poverty does not, I think, arise in the present case, for in each of the Acts words are used which do include institutions of which that is the object. In point of fact there are in each Act institutions having the three different objects of bounty specially referred to. "Hospital" is mentioned in both, and clearly includes, even if it includes more, institutions for the relief of physical ailments; "charity school" occurs in the one Act and "public school" in the other, which words apply to educational establishments for the advantage of the young, but with them we have nothing to do here; and then the word "almshouse" occurs in the one Act and the phrase "house provided for the reception or relief of poor persons" in the other, both of which include institutions for the relief of poverty. That being so, I do not think it material in the present case to consider whether the word "hospital" includes such institutions. The only reason why cases as to hospitals were referred to was because some light may be derived from decisions as to hospitals, using the word in the modern sense; they have generally been decisions as to institutions for lunatics. In those cases it has been held that the institution need not necessarily be supported wholly by a charitable endowment; if there was a substantial endowment, although some money might be received from the recipients of the partial charity or in other ways towards the support of the institution, it would not be deprived of the benefit of these statutory exemptions, whereas if it was entirely self-supporting

1904

MARY CLARK HOME (TRUSTEES OF) v. ANDERSON.

Channell J.

it would. That principle has been clearly decided by *Needham* v. *Bowers* (1) and *Cawse* v. *Nottingham Lunatic Hospital* (2), and by *Musgrave* v. *Dundee Royal Lunatic Asylum* (3), which followed and commented upon them. The only importance in the present case of discussing the word "hospital" is because it is suggested on the one hand that the same considerations would apply to the word "almshouse" as to a "house provided for the relief of poor persons," and on the other hand that the word "almshouse" must be confined to institutions which are entirely charitable; I am not at present considering the point of real doubt in this case, namely, whether the objects of this charity can properly be described as poor persons. The institution receives no money otherwise than from the charitable endowment; it provides for these ladies rooms, fire, light, and a certain amount of attendance; it receives no payment at all from them or from anybody; so that the entire annual value or benefit of the institution is devoted to assisting the inmates, who, however, have to provide their own food and clothing. It seems to me that there is no possible doubt that this is substantially a charitable endowment; the establishment is not self-supporting, and I think that the principles that were laid down in the cases of the lunatic hospitals are applicable to it; but in any event the difficulty which was present in some of those cases does not arise here.

That brings me to the question whether this can properly be called an "almshouse" or a "house for the reception or relief of poor persons." I tried to get some light as to what was meant by a poor person, but very little information is to be obtained upon the subject. During the argument reference was made to *Attorney-General* v. *Wilkinson* (4), which proceeded upon the view that there was at that time (1839) a clearly established doctrine of the Court of Chancery to the effect that, where a charity was for the benefit of poor persons it was wrong to devote it in such a way as to take poor persons off the rates, because in that event the benefit of the charity

(1) 21 Q. B. D. 436.
(2) [1891] 1 Q. B. 585.
(3) 22 R. 784.
(4) 1 Beav. 370; 49 R. R. 385.

accrued, not to the poor person, but to the ratepayer. That seems to lead to the conclusion that the expression "poor person" in a trust for the benefit of poor persons does not mean the very poorest, the absolutely destitute; the word "poor" is more or less relative. The difficulty in such a case as the present is to determine from which point of view the question is to be looked at, for obviously very different views may be held as to what is poverty and what is riches. The present institution is of a peculiar character, and I agree that in all probability such institutions are comparatively modern. In the time of Lord Coke, who gives us his view of the nature of a hospital, such an institution probably did not exist. Its objects are clearly defined, and obviously one of them is not to keep the inmates from starvation; the main object is to give them greater comfort than with their limited means they could otherwise enjoy. The rules may be altered from time to time at the discretion of the trustees, but they indicate at least the general character of the institution, which is intended for ladies, not necessarily old, but at least of the age of fifty, who have been in a better position in life. At present there is a limit to their income: they must not possess more than 55*l.* a year, rather over 1*l.* a week, and they must have at least 25*l.* a year. The latter limit no doubt means that those possessing a lesser income than 25*l.* could not really get the benefits intended to be conferred by the institution, for it does not provide them with food or clothing; it gives them rooms, fire, and light, and a lady who had not enough to provide herself with food could not really avail herself of the institution; she would be an incumbrance to other inmates, who probably would share their own small means with her. To admit such inmates would really break down the institution altogether. But I strongly suspect that the absolutely destitute would nevertheless not be excluded in fact, and that if such an inmate were admitted she would probably appeal to some other charity and get the necessary income of 25*l.* in that way. From a practical point of view I cannot regard the necessity of having the 25*l.* a year as having the operation of necessarily excluding the absolutely destitute; they might be admitted if

1904

MARY CLARK HOME (TRUSTEES OF) v. ANDERSON.

Channell J.

they could get other charitable assistance sufficient to enable them to avail themselves of the institution.

Now is this an institution for poor persons? I do not know any standard of poverty, nor how I can lay down any rule; the only thing to guide me is this: these ladies go to the institution for the sole reason that they are poor, and the institution is absolutely charitable; it may fairly be called an "almshouse," though one would not care to hurt the feelings of the residents by so calling it in common parlance. There are not so many definitions of "almshouse" as there are of "hospital"; but, applying one's own knowledge to its interpretation, I do not think that the almshouses which exist in considerable numbers in almost all old towns in this country are as a rule confined to absolutely destitute persons. It is sufficient that the people who become inmates go there as a matter of charity, and these ladies go to this institution as a matter of charity. The foundress recognised that there were many ladies who, by reason of their having been brought up with certain comforts, would feel more seriously than those who had not had that advantage the deprivation of those comforts, and she was desirous of helping them. Whether everybody would call such persons "poor" I cannot say, but I do say that the chief title of these ladies to be admitted is that in the estimation of the foundress and of the trustees they are objects of charitable assistance; and, therefore, I think that they may be considered to be poor, unless the rules of the institution shew that they cannot possibly be so treated; the trustees are the judges as to whether they are poor, subject only to their decision being reviewed if they go outside anything which can possibly be considered to be poverty. If that is a fair test, I think that I may hold this institution to be an almshouse and a house provided for the reception or relief of poor persons. The question is entirely a matter of degree, and depends so entirely upon the point of view of the person who has to decide it that it is difficult to arrive at a satisfactory decision. Primâ facie I think it must be for the trustees or for those who admit these ladies, and who admit them solely on the ground that they are poor, to judge in the first instance whether they are

poor in the proper sense of the term, and that the judge or tribunal which has to review their decision ought not to hold that these ladies who have been admitted are not poor persons. It is not the case of a millionaire saying that in his judgment every one who had not got 1000*l.* a year must be considered poor; and in the very improbable event of such a case arising I think the tribunal ought to hold such a view to be wholly unreasonable and outside the scope of what could reasonably be considered to be poverty. In this case I think that the limits of the amount of income of an inmate are not such that it can be said to be altogether unreasonable to consider the inmate a poor person.

On the whole I have come to the conclusion that this institution, the objects of which are entirely charitable, may be deemed to be an almshouse; to make a place an almshouse it is not necessary that the inmates should be entirely destitute, or that it should supply all their wants. I am satisfied that a large number of institutions popularly known as almshouses do not in point of fact supply the entire wants of their inmates, but include people who have some other means, and in many cases must have some other means in order to avail themselves of the benefits of the institution. I think, therefore, that this institution is exempt under both Acts and that the appeals must be allowed.

Appeals allowed.

Solicitors for appellants: *Walker, Son & Field, for Peacock, Cooper & Gregory, Liverpool.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

W. J. B.

1904
June 28, 29.

PRUDENTIAL INSURANCE COMPANY, APPELLANTS *v.* COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

Revenue—Stamp—"Policy of Life Insurance"—Old Age Endowment Policy—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 98.

An instrument whereby it is contracted that, in consideration of the payment by a person of a weekly premium of 6*d.*, a sum certain is to be paid to him on his attaining the age of sixty-five, or, in the event of his dying under that age, a smaller sum is to be paid to his executors, is a policy of insurance upon a contingency depending upon a life within the meaning of s. 98 of the Stamp Act, 1891.

Semble, that even if the portion of the said contract relating to the payment of money to the assured on his attaining the age of sixty-five stood alone, it would be a policy of insurance upon a contingency depending upon a life within the said section.

CASE stated by Commissioners of Inland Revenue.

On January 13, 1904, an instrument was presented on behalf of the appellants to the Commissioners of Inland Revenue under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable. The instrument, which was under seal, was headed as follows: "Prudential Assurance Company, Limited—Industrial Branch—Old Age Endowment with Life Assurance from entry to 65 years of age. For ages from 11 to 15 next birthday after entry." It witnessed that the company agreed that, in consideration of a weekly premium of 6*d.* to be paid to them by the assured until he should attain the age of sixty-five or during his life, they should make one or other of the following payments, according to the event which should happen: if the assured should attain the age of sixty-five years, they would pay him the sum of 95*l.*, and in the alternative, if he should die under the age of sixty-five, they would pay to his executors or administrators the sum of 30*l.* The instrument further provided that after it had been in force for five years the company would, in exchange for the same (if and while subsisting), grant certain pecuniary benefits specified in a schedule thereto, and corresponding with the age of the assured and the duration of the policy.

The policy was taken out by one W. R. Aucutt for the use and benefit of his son Wilfred Aucutt, the assured being of the age of fourteen years on his next birthday after entry. In calculating the sums alternatively payable under the said instrument, regard was had, with reference to the payment of the said sum of 95*l.* and of the pecuniary benefits offered in exchange for the surrender of the instrument, to the probability of Wilfred Aucutt living to attain a given age, and, with reference to the payment of 30*l.* on death, to the probability of his dying at an earlier date. These diverse probabilities were estimated by actuarial calculations based upon the table of mortality known as the English Life Table, No. 3, which is a table shewing the probabilities of the duration of human life founded upon the observed rates of mortality at different ages in England and Wales, and is the table used by the appellants for calculating premiums under policies of ordinary "whole life" assurance. Many kinds of instruments purporting to be policies of assurance are now issued by life assurance companies under which sums are contracted to be paid, either (*a*) at a particular period or on the previous death of the assured, or (*b*) on the assured attaining a particular age or on the previous death of the assured (in each of these cases, where the same amount of money is payable in either event, according to the practice of the Commissioners life policy duty is charged); and in the case of some instruments sums are thereby contracted to be paid at the expiration of a particular period, if the assured is living, and a further sum at death. These and similar forms of assurance are commonly known as "endowment assurances," and of recent years have become increasingly popular. It is not known when policies of this nature were first introduced, but they are now, and were at least as far back as 1863, very common. At the present time their issue constitutes by far the largest part of the business of the companies which transact life assurance business (other than industrial assurance).

The Commissioners being of opinion that the main part of the appellants' contract was the promise to pay the said sum of 95*l.* upon the said Wilfred Aucutt attaining the age of sixty-

1904

PRUDENTIAL INSURANCE COMPANY v. INLAND REVENUE COMMISSIONERS.

five years, and that the promise to pay the lesser sum on his dying before that age was merely incidental thereto, were of opinion that the instrument was not, as contended by the appellants, a policy of life insurance within the meaning of the definition contained in s. 98 of the Stamp Act, 1891, and assessed the duty thereon under the heading "Mortgage, Bond, Debenture, Covenant" in the 1st schedule to the said Act at 2*s.* 6*d.*, as being a covenant for securing the payment of money not exceeding 100*l.* If the instrument was to be treated as a policy of life insurance, the duty payable would have been 1*s.* The question for the Court was, with what duty the instrument was chargeable.

Danckwerts, K.C., *Vaughan Hawkins*, and *P. Gregory*, for the appellants. This document was a policy of life insurance. A policy of life insurance is defined by s. 98, sub-s. 1, to mean a "policy of insurance upon any life or lives, or upon any event or contingency relating to or depending upon any life or lives." The endowment portion of the policy has reference to a contingency depending upon life just as much as has the life insurance portion. The 95*l.* is to be payable only in the event of the child living to the age of sixty-five. If a covenant to pay a fixed sum in the event of the assured not attaining a specified age is a policy of life insurance, it must equally be so if you omit the word "not." In Bunyon on Life Insurance at p. 1 the contract of life insurance is defined to be one "in which one party agrees to pay a given sum upon the happening of a particular event contingent upon the duration of human life, in consideration of the immediate payment of a smaller sum or certain equivalent periodical payments by another." In the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), the Act which enabled assignees of life policies to sue in their own names, the expression "policy of life insurance" is defined to mean "any instrument by which the payment of moneys, by or out of the funds of an assurance company, on the happening of any contingency depending on the duration of human life, is assured or secured." It is not limited to the contingency of death. The present instrument would clearly

have been a life policy within that Act. These policies have in practice always been treated as life policies, but the question of the stamp duty applicable has never before arisen.

Sir Robert Finlay, A.-G., and *Rowlatt*, for the Commissioners. This is something more than a life policy. The appellants themselves in the heading to their policy form treat old age endowment as distinct from life insurance. It may be that if this were a policy of insurance it would be a policy of life insurance, inasmuch as the payment of the money depends on the contingency of the duration of life. But it is not a policy of insurance at all. To constitute a contract of insurance there must be something against the happening of which the insurance is effected. An insurance on ship goods or life means an insurance against something happening which is prejudicial to the ship goods or life. If the money is to be payable on the happening of an event which is not disadvantageous to the assured, the contract is not one of insurance. If the appellants' contention is right, then the term "policy of life insurance" would include a covenant to pay an annuity for life. The fact that these endowment policies are based on the tables of mortality does not make them life insurances, for annuities are equally based on those tables.

Danckwerts, K.C., in reply. It is true that in the case of fire and marine policies the event upon which the money is to be payable must be some loss to the assured. But that is not the case with life policies. They are not contracts of indemnity, and the event upon which the money under that class of policy is to be payable need not be prejudicial to the assured. No doubt the Life Assurance Act, 1774 (14 Geo. 3, c. 48), to prevent the making of mere gambling policies, required that the assured should have an interest at the time of effecting the insurance, and that no more should be recoverable under such policies than the amount of the interest which the assured had at that time. But it is well settled by authority that the statute does not require that the interest should be a continuing interest: *Dalby* v. *India and London Life Assurance Co.* (1); *Law* v. *London Indisputable Life Policy Co.* (2)

(1) (1854) 15 C. B. 365.

(2) (1855) 1 K. & J. 223.

1904

PRUDENTIAL INSURANCE COMPANY v. INLAND REVENUE COMMISSIONERS.

CHANNELL J. The question which I have to decide is whether the instrument, a copy of which is set out in the case, is a "policy of insurance upon any life or lives or upon any event or contingency relating to or depending upon any life or lives" within the meaning of s. 98 of the Stamp Act, 1891. The Commissioners of Inland Revenue decided that the instrument was to be stamped as a covenant. No doubt it is a covenant, for it is a contract under seal to pay certain sums of money in certain events. At the same time, it is agreed on both sides that if it comes within the specific definition of a policy of life insurance it is to be stamped as such and not as a covenant. The document in question is headed "Old Age Endowment with Life Insurance," and that heading is to some extent relied on by the Attorney-General as shewing that the parties do not regard it as a life insurance simply, but as something else coupled with a life insurance. But I do not attach much importance to that. It is merely an advertising heading, designed to induce people to enter into the contract by describing it as advantageous. We must look at the contract itself to see what it really is. Now in order that it may come within the definition of a policy of life insurance, it must first of all be a policy of insurance. And whether it is a policy of insurance is I think substantially the only question in this case. For if it be a policy of insurance at all, I cannot help thinking that it is free from doubt that it is a policy upon an event relating to or dependent upon a life. "Policy of insurance" is defined in s. 91 to include "every writing whereby any contract of insurance is made or agreed to be made or is evidenced, and the expression 'insurance' includes assurance." But that definition does not throw much light on the matter. We still have to consider what is a "contract of insurance." The Attorney-General says that to constitute a contract of insurance it must be a provision against something—against some loss or disadvantageous event. Mr. Danckwerts says that may be true as regards marine and fire policies which are indemnities against loss, but it is not true as regards life policies, for a policy of life insurance is not a contract of indemnity. But the question is whether that

makes any real difference, and it seems to me that we must inquire a little further into the nature of a contract of insurance. Where you insure a ship or a house you cannot insure that the ship shall not be lost or the house burnt, but what you do insure is that a sum of money shall be paid upon the happening of a certain event. That I think is the first requirement in a contract of insurance. It must be a contract whereby for some consideration, usually but not necessarily for periodical payments called premiums, you secure to yourself some benefit, usually but not necessarily the payment of a sum of money, upon the happening of some event. Then the next thing that is necessary is that the event should be one which involves some amount of uncertainty. There must be either uncertainty whether the event will ever happen or not, or if the event is one which must happen at some time there must be uncertainty as to the time at which it will happen. The remaining essential is that which was referred to by the Attorney-General when he said the insurance must be against something. A contract which would otherwise be a mere wager may become an insurance by reason of the assured having an interest in the subject-matter—that is to say, the uncertain event which is necessary to make the contract amount to an insurance must be an event which is primâ facie adverse to the interest of the assured. The insurance is to provide for the payment of a sum of money to meet a loss or detriment which will or may be suffered upon the happening of the event. By statute it is necessary that at the time of the making of the contract there should be an insurable interest in the assured. It is true that in the case of life insurance it is not necessary that the interest should continue, and the interest is not the measure of the amount recoverable as in the case of a fire or marine policy. Still, the necessity of there being an insurable interest at the time of the making of the contract shews that it is essential to the idea of a contract of insurance that the event upon which the money is to be paid shall primâ facie be an adverse event. Thus a contract depending upon the dropping of a life, such as a contract whereby two or more people purchase a property as joint tenants with the object of

1904

PRUDENTIAL INSURANCE COMPANY v. INLAND REVENUE COMMISSIONERS.

Channell J.

the longest liver getting the benefit of survivorship, would not be a contract of life insurance, although it would be a contract with reference to a contingency depending upon a life or lives; it would not be a contract of insurance at all. A contract of insurance, then, must be a contract for the payment of a sum of money, or for some corresponding benefit such as the rebuilding of a house or the repairing of a ship, to become due on the happening of an event, which event must have some amount of uncertainty about it, and must be of a character more or less adverse to the interest of the person effecting the insurance. Then does the particular contract with which we have here to deal come within that definition of a contract of insurance? The contract is to pay a sum of 95*l.* if the person insured attains the age of sixty-five, and 30*l.* if he dies under that age. It seems to me that for the purpose of determining whether that contract comes within the definition we must look at it as a whole, and not split it up into two separate parts. If it were to be so split up, and treated as two separate contracts, I should incline to the view that even the old age endowment portion of it—that is to say, the contract to pay the sum of 95*l.*—would satisfy the definition. In the first place, the event on which the money is to be paid is uncertain, for it is uncertain whether the assured will live to the age of sixty-five, and whether consequently the money will be payable at all. Secondly, it seems to me that the event, in addition to being uncertain, is primâ facie adverse to the interests of the insured. A person whose life was insured at a premium of 6*d.* a week would presumably be a poor person and one who would have to earn his own living, and his capacity of so earning his living would probably be materially diminished by the time he reached the age of sixty-five. The reaching of that age, with its attendant disadvantages, is to my mind an event which is sufficiently adverse to the interest of a poor person to make it a proper subject against which to insure. Therefore, even if this endowment portion of the policy stood alone, and if the contract purported to be nothing more than a provision against old age, I am strongly of opinion that it would be a policy of insurance, and if a policy of insurance, then also a policy of

life insurance, for it seems clear that it would be an insurance upon a contingency relating to life—the contingency of the insured living to the age of sixty-five. But, as I have said, we must look at the contract as a whole. And when you take the whole contract together, there does not seem to be any real difficulty about the matter. A contract of life insurance is one by which persons entitle their executors to receive a sum of money for distribution among their family in the event of their death. The objection to insurance is that, if the insured lives beyond the average period of life upon which the premiums of insurance are based, he has made a bad bargain, and he would have done better if he had saved his money and invested it at compound interest. Consequently, in order to attract insurances, it is usual for the insurance companies to give benefits to persons who live beyond the average period of life. Most of them do this by way of bonuses after the policy has been in existence for a certain period, and the giving of such a bonus, of course, does not prevent the contract from being a contract of insurance. Sometimes it is provided that the sum insured shall be payable either upon the assured reaching a certain age or upon death, whichever first happens. It is clear that that also would be a contract of insurance. That is very like this case, the only difference being that here a larger sum is payable in the former event, and that is a difference which, in my opinion, is immaterial. I have come to the conclusion that this contract, taken as a whole, is clearly a contract of life insurance within the meaning of the Stamp Act, and that the appeal must, therefore, be allowed.

Judgment for the appellants.

Solicitor for appellants: *W. Gamble.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

J. F. C.

1904
June 30;
July 1.

ALIANZA COMPANY *v.* BELL.

Revenue—Income Tax—Nitrate Grounds situate Abroad—Profit and Gains —Deduction to meet Exhaustion of Material—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D*, 1*st Case*, *Rule* 3.

The appellants, an English company, were the owners of land in Chili containing deposits of a substance called caliche, from which they extracted by a process of manufacture nitrates and iodine for the market. When the whole of the caliche is exhausted, the land and the machinery and plant used in the manufacture would practically be of no value:—

Held, that in computing their profits for income tax the appellants were not entitled to deduct any yearly sum to meet the exhaustion of the caliche, and that it made no difference in this respect that the land in question was situate abroad, and that the appellants were consequently assessable under Sched. D, instead of under Sched. A, as in the case of mines situate in this country.

CASE stated by Commissioners of Income Tax for the City of London.

The appellants are an English company and were incorporated in June, 1895, under the Companies Acts, 1862 to 1890, and have a registered office at 3, Gracechurch Street, in the City of London. They are the owners of nitrate grounds known as Alianza, in the province of Tarapaca, in the Republic of Chili, containing 361 Peruvian estacas or thereabouts, with the buildings and machinery thereon, and they have erected a factory thereon. They manufacture from "caliche" nitrates and iodine, and export the same for sale. They also own for the purposes of their business a railway about four miles in length. The raw material, "caliche," from which nitrate is produced, is found in deposits upon the nitrate grounds either at or close to the surface, and in layers covering the nitrate grounds about six feet in depth. The chief value of the nitrate grounds consists in the caliche which is found on the land, and when the same has been worked out and exhausted the land, machinery, and plant will be of little value. Before the purchase of the nitrate grounds by the appellants they had been examined and tested by numerous bore-holes for the purpose of ascertaining the presence and extent of the layers of caliche. The process

of manufacture which has been followed by the appellants is as follows: The raw material (caliche), which usually contains about 30 per cent. of nitrate of soda, is loosened in the ground by means of explosives, and is then dug up and carted or railed to the works. It is then crushed and subjected to various processes of manufacture, and is then bagged and sent by rail to the ports and shipped. To produce nitrate of potash, subject to certain modifications of detail in manufacture, the general treatment is the same. The caliche on the nitrate grounds owned by the appellants is year by year consumed and worked out, being the raw material used for the production of nitrates and iodine. The exact amount of caliche used by the appellants in any year can be ascertained without difficulty. The appellants' gross profits are wholly derived from the sale of nitrates and iodine. An assessment having been made upon the appellants under Sched. D of the Income Tax Act for the year ending April 5, 1901, of 67,950*l.*, based on the appellants' printed accounts for the three preceding years, the appellants appealed to the Commissioners of Income Tax, claiming that they were entitled, for the purpose of computing the balance of their profits and gains, to deduct a yearly sum to meet the exhaustion of the nitrate grounds. The Commissioners disallowed the claim and confirmed the assessment.

Danckwerts, K.C., and *Bremner*, for the appellants. If these nitrate grounds were situate in this country, it is conceded that the appellants' claim could not be supported, for they would then be assessed under Sched. A, and the basis of the taxation under that schedule is the annual value of the property, and for the purpose of arriving at the annual value of property it is immaterial what the property cost; the annual value must be the same whatever it cost. But Sched. A only applies to lands situate in this country. The business of working mineral land abroad is assessed under Sched. D, under which the subject of taxation is not the property, but the profits and gains derived from working it. And when the business, as here, consists in working up raw material into a marketable commodity, in order to arrive at the profits of that business for the year it is obvious

1904

ALIANZA COMPANY v. BELL.

that you must deduct the cost of the raw material used during the year, otherwise you are taxing the capital. In the present case the cost of the raw material used during the year is a sum which stands to the total price paid for the nitrate grounds in the proportion which the amount consumed during the year bears to the total amount of the caliche in the soil at the date of the purchase; and that latter quantity is one which can readily be measured. If the caliche were bought by the appellants from third persons from time to time as it was wanted, it could not be disputed that the prime cost could be deducted. And it can make no difference for this purpose whether the manufacturer buys from hand to mouth each year, or buys a large quantity at one time to be used in a period of several years. It is like the case of a wine merchant who lays down a large quantity of wine in a good year in the expectation of being able to make a profit out of it in future years. It is not necessary that the manufacturer should pay for the raw material consumed in each year during the year of assessment. In *Knowles* v. *McAdam* (1) the Exchequer Division held that a colliery company being assessed to income tax in respect of their business as colliery proprietors were entitled to deduct from their profits for exhausted capital the amount by which the mines were worth less at the end of the year's working by reason of the coal gotten during the year. The Court proceeded upon the assumption that mines were by virtue of the Revenue Act, 1866 (29 & 30 Vict. c. 36), s. 8, taxable under Sched. D, and not under Sched. A. That view was overruled in *Coltness Iron Co.* v. *Black* (2), where it was held that a tenant of minerals in the United Kingdom was not entitled to deduct from his gross profits a proportion of the money spent in sinking pits. But although that case overrules *Knowles* v. *McAdam* (1) upon the question of the schedule under which mines in this country are taxable, it leaves untouched the decision of the Exchequer Division as to the deductions which may properly be made for the purpose of arriving at the profits under Sched. D, and the earlier case stands as an authority in favour of the mine owner in the case of a mine situate abroad. It does not appear very clearly from

(1) (1877) 3 Ex. D. 23. (2) (1881) 6 App. Cas. 315.

the statement of the case of *Coltness Iron Co.* v. *Black* (1) in the *Law Reports* that the assessment was under Sched. A, but it does so appear from the statement of the case in 1 Tax Cases, p. 287, and also from the judgment of Lord Blackburn.

Rowlatt (*Sir Edward Carson, S.-G.*, with him), for the Crown. No distinction can be drawn between the principle of the assessment of mines abroad and that of mines in this country. The case of *Coltness Iron Co.* v. *Black* (1) cannot be distinguished from the present case upon the ground that the assessment in the former was under Sched. A, for mines fall, not under No. 1 of that schedule, under which the annual value of the lands is understood to mean the rent at which they are worth to let by the year, but under No. 3, under which the annual value is understood to mean the amount of the profits received from the property within the time therein specified. Therefore in the case of a mine even in this country what the Court have to ascertain is what were the profits of the mine. Then by s. 100, Sched. D, First Case, rule 3: "In estimating the balance of profits and gains chargeable under Sched. D no sum shall be set against or deducted from such profits or gains for any sum employed or intended to be employed as capital in such trade, manufacture, adventure, or concern." And by s. 188 every provision in the Act which is applied to the duties in any particular schedule, and which is also applicable to the duties in any other schedule, shall, unless repugnant to the provisions for ascertaining the same, be applied thereto. Therefore, in ascertaining the profits of a mine under Sched. A, no allowance or deduction is to be made for capital expended. Thus in *Addie* v. *Solicitor of Inland Revenue* (2) it was held that no deductions could be made to replace the sum expended in sinking pits. And that view was adopted by the Lords in *Coltness Iron Co.* v. *Black*. (1) Consequently the decisions upon the questions of deductions from gross profits in the cases of mines in this country are equally applicable to the case of mines situate abroad. The case of *Knowles* v. *McAdam* (3) relied upon by the appellants does not

(1) 6 App. Cas. 315. (2) (1875) 2 D. 431.

(3) 3 Ex. D. 23.

1904

ALIANZA COMPANY v. BELL.

support their contention, for the House of Lords in *Coltness Iron Co.* v. *Black* (1) did not merely decide that British mines must be dealt with under Sched. A, but they dissented from the whole reasoning of the Exchequer Division. The contention of the appellants that they are merely manufacturers, and that as such they are entitled to deduct from their gross trade profits the purchase-money of the nitrate grounds as being the price of the raw material used in their trade, is unsound. They in truth carry on two businesses, that of mine owners and of manufacturers, and they in the former capacity sell the raw material to themselves in the latter capacity. And though as manufacturers they may be entitled to deduct the cost of the raw material, they as mine owners must be charged upon their profits, and those profits will exactly equal the amount of the deduction made by them in their other capacity. What they claim is to be placed in the position of manufacturers who have bought abroad raw material from foreigners who were not liable to British taxation. But those are not the facts before the Court.

Bremner, in reply.

CHANNELL J. In this case I have to deal with an appeal from an assessment to income tax, the ground of the appeal being that, in the computation of the appellants' profits and gains arising from the manufacture of nitrates from a material called caliche, they were improperly disallowed a deduction which they claimed in respect of the cost price to them of the raw material used in the manufacture. The business which the appellants carry on is this: they are the owners of certain property in Chili known as nitrate grounds, in which there is a deposit of caliche, the valuable part of which consists of nitrates. The nitrates have to be extracted by a process which I may call a process of manufacture; it is sufficient so to call it, though perhaps it is not quite accurate. Their business consists in digging up this stuff, carrying it for some distance upon a railway of their own, and then dealing with it in such a way as to extract the valuable products. It is one of those cases in which the process necessarily exhausts the material; and in all cases

(1) 6 App. Cas. 315.

where you have to ascertain for the purpose of rating, or for the purpose of any kind of taxation, the annual value or profits of an undertaking which necessarily consumes in the course of its working the stock upon which it starts, you have a problem of considerable difficulty to deal with. It arises in the case of mines and quarries and brickfields, and for a slightly different reason in the case of cemetery companies. With respect to the computation of profits for the purpose of income tax, you have certain fixed rules provided by the Income Tax Acts, and those rules must be followed even if they should lead to a conclusion as to the profits of a particular undertaking at which one would not have arrived if the rules were not there. Now income tax is in some respects peculiar. It is clear that for the purpose of income tax an income is assessed on the same basis whether it is a permanent income or a temporary one. A man's earnings which come to an end are treated in exactly the same way as an income derived from a permanent investment such as Consols. So too in the case of an income derived from leaseholds, the income is ascertained according to what is actually received in the year without any deduction for a sinking fund to replace the premises at the end of the term. This fact that temporary incomes are dealt with on the same footing as permanent ones affords a guide as to the way in which one ought to assess an undertaking like a mine. The mine owner starts with his seams of coal or other minerals and in due course works them out, and in the case of mines situate in this country it is clear that he pays on what he gets out of the mine less the current expenses of getting it, but without allowance to him for the price which he paid for acquiring the mine. Such mines, if in the United Kingdom, are assessed under Sched. A (1), the words of which are: "For and in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom, and to be charged for every twenty shillings of the annual value thereof" so much. And it is well settled by decisions that the annual value in those cases is to be measured by what is got out of the property, without any deduction for the cost of acquiring

(1) Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2.

1904

ALIANZA COMPANY v. BELL.

Channell J.

the property in the first instance. But Mr. Danckwerts says that, though that is true of mines situate in this country, which are assessed under Sched. A, it is not true of mines which are situate abroad and which are assessed under Sched. D, the words of that schedule being: "For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere." (1) It is suggested that where, as here, the income is assessed, not under Sched. A, but under Sched. D, it makes all the difference, because what you have to get at is, not the annual value of the property, but the profits or gains, and it is said that you cannot get at the profits or gains of a concern which consists in manufacturing articles for sale unless you take into account the cost price of the raw material from which articles are manufactured. As a general rule that is of course absolutely correct. The subject was dealt with very fully by Kelly C.B. in the case of *Knowles* v. *McAdam* (2), which Mr. Danckwerts says is really conclusive in his favour, assuming that the property is to be assessed under Sched. D; and personally I think the reasoning of the Chief Baron is unanswerable if taken in connection with an undertaking to which it can be properly applied. But I think that in the case of *Coltness Iron Co.* v. *Black* (3) the House of Lords not only differed from the Exchequer Division upon the point whether property of this sort ought to be assessed under Sched. A or Sched. D, but also differed in thinking that the principle adopted by the Exchequer Division was not applicable to an undertaking of this sort, even if it was to be assessed under Sched. D. And the reason is this: Under Sched. D there are certain fixed rules by which the profits are to be ascertained, and it may be that those are conventional

(1) 16 & 17 Vict. c. 34, s. 2. (2) 3 Ex. D. 23.
(3) 6 App. Cas. 315.

rules for ascertaining a sum which the Income Tax Act calls by the name of profits, but which are not really profits in the ordinary sense of the term. The Legislature might if it chose say that the gross receipts of a business should be treated as profits for the purpose of income tax without any allowance for current expenses, and, if it did say so, the rule would have to be followed. But it has not gone quite so far as that. I find nothing in the rules to say that if the business to be assessed is that of manufacturing an article and selling it, and nothing more, the cost price of the material consumed in the manufacture is not to be taken into account in assessing the profits. In the ordinary case, the cost of the material worked up in a manufactory is not a capital expenditure; it is a current expenditure, and does not become a capital expenditure merely because the material is provided by something like a forward contract, under which a person for the payment of a lump sum down secures a supply of the raw material for a period extending over several years. I do not think it would be necessary that the payment for the raw material should be in the year of assessment, or even in the three years over which the average extends. It is not necessary to deal with that point at present, and I do not decide it; I merely say that I do not think it would be necessary. The question in this case which we have to consider is what is the nature of the adventure or concern which this particular company is carrying on. If it is merely a manufacturing business, then the procuring of the raw material would not be a capital expenditure. But if it is like the working of a particular mine or bed of brick earth, and converting the stuff worked into a marketable commodity, then the money paid for the prime cost of the stuff so dealt with is just as much capital as the money sunk in machinery or buildings. In my opinion the particular adventure here belongs to the latter category. This company must be treated as a company formed for the purpose of working and developing the bed of caliche. If it carried on a general business of purchasing and developing similar properties it is possible the matter might be otherwise; but here it is formed merely to work this particular bed, and consequently

1904

ALIANZA COMPANY v. BELL.

Channell J.

the money sunk in purchasing this bed is a capital and not a current expenditure. Then, if it is a capital expenditure, no allowance can be made in respect of it in estimating the profits. The third rule of the First Case provides that there shall be no deduction "for any sum employed or intended to be employed as capital in such trade, manufacture, adventure, or concern." Any prudent person who carries on a business or gets an income from something, in which the capital is necessarily wasting, either by lapse of time, as in the case of a leasehold, or by reason of the using up of the material with which he starts as part of his capital, will provide for such a case by a sinking fund—by putting aside each year so much in order to meet the exhaustion of the capital. But, although it is a prudent course to adopt, any deduction in respect of it is not permitted by the Income Tax Acts. Even in the very clear case of depreciation of machinery used in trade under the original Acts no deduction could be made; and the fact that it has now been specially provided for by statute rather emphasizes than otherwise the general principle of the Acts that the provision for wasting capital by means of a sinking fund cannot be allowed for in the computation of profits and gains. Even if this case were to be treated in the manner most favourable to the company, and if the concern were looked upon as consisting of two distinct businesses, one a mining business of extracting the caliche from the ground, and the other a manufacturing business in which the raw material, the caliche, is manufactured into nitrates, the result would be the same, for the mining company would be credited with receiving the price of the raw material handed over to the manufacturing company, and the latter would be debited with the same sum as the cost of the material bought by them. I am, therefore, of opinion that this appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Ashurst, Morris, Crisp & Co.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

J. F. C.

SYKES, Appellant *v.* BARRACLOUGH, Respondent.

1904
July 8, 15.

Coal Mine — Check-weigher — Removal — Interfering with Workmen — Coal Mines Regulation Act, 1887 (50 & 51 *Vict. c.* 58), *s.* 13.

By s. 13, sub-ss. 4 and 5, of the Coal Mines Regulation Act, 1887, it is provided that on the complaint of the owner of a mine a Court of summary jurisdiction may order the removal of a check-weigher on the ground, amongst others, that he has "interfered with any of the workmen":—

Held, that interference with the workmen within the above section is not limited to acts done by a check-weigher by virtue of or in connection with his office, or to acts done at the mine.

Case stated by justices of the West Riding of Yorkshire.

A complaint was preferred by the respondent, who was the certified manager of the Ackton Hall Colliery, Featherstone, and of a certain mine, the Silkstone pit, of that colliery, under s. 13 of the Coal Mines Regulation Act, 1887 (1), against the appellant, who was the check-weigher on behalf of the persons

(1) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58):—

Sect. 13: "(1.) The persons who are employed in a mine and are paid according to the weight of the mineral gotten by them, may at their own cost, station a person (in this Act referred to as a 'check-weigher') at each place appointed for the weighing of the mineral.

"(3.) A check-weigher shall not be authorized in any way to impede or interrupt the working of the mine, or to interfere with the weighing, or with any of the workmen or with the management of the mine.

"(4.) If the owner, agent, or manager of the mine desires the removal of a check-weigher on the ground that the check-weigher has impeded or interrupted the working of the mine, or interfered with the weighing, or with any of the workmen, or with the management of the mine, or has at the mine to the detriment of the owner, agent, or manager done anything beyond taking such account determining such deductions or giving such information as aforesaid, he may complain to a Court of summary jurisdiction who, if of opinion that the owner, agent, or manager shews sufficient primâ facie ground for the removal of the check-weigher, shall call on the check-weigher to shew cause against his removal.

"(5.) On the hearing of the case the Court shall hear the parties, and, if they think that at the hearing sufficient ground is shewn by the owner, agent, or manager to justify the removal of the check-weigher, shall make a summary order for his removal, and the check-weigher shall thereupon be removed, but without prejudice to the stationing of another check-weigher in his place."

1904

SYKES v. BARRACLOUGH.

employed at the mine, that the appellant did, on November 13, 14, 19, 20, and 21, 1903, unlawfully impede and interrupt the working of the mine, and did unlawfully interfere with certain of the workmen employed at the mine, and did unlawfully interfere with the management of the mine.

The justices were of opinion that the respondent had shewn sufficient primâ facie ground for the removal of the appellant as check-weigher, and the appellant was duly summoned to appear to shew cause against his removal.

The facts found by the justices on the hearing of the case were as follows. The appellant, in addition to being check-weigher, was also president of the local miners' association. On November 19, 1903, the appellant presided over a meeting of the men employed in the Ackton Hall Colliery, held at an hotel in Featherstone, which had been called to consider the question of working on play-days. Play-days were days on which the pits were not working for pulling coal, and the only work which was done on those days was work necessary for the safety of the pit roads, workings, roofs, and ventilation. There was no coal-getting. On a play-day, therefore, the appellant had no business at the pit. Four men had been previously stopped by the respondent for refusing to work on a play-day for the opening out of some blocked ventilation, and this meeting had been called to consider the matter. The appellant told the four men whose checks had been stopped not to go and see the respondent, but to be at a pit-gate meeting next morning not later than 4.30, and he (the appellant) would see that there were others to stop the men from going to work, and that they would then have a meeting at 5.30. Accordingly on the morning of November 20 there was a pit-gate meeting—that is to say, a meeting at the entrance to the colliery yard as the men were going to work. The appellant spoke at the meeting and said that the men were not to go into the pit, and he asked for a motion to stop play-day working either by fair or foul means, and he said that he would stop play-day working one way or another. The appellant also told the men that they were not to work on play-days in future. Several men, called as witnesses, went on November 20 to work, but did not go to

work as they were told not to do so. The appellant also told the men at this meeting to go back and to come back in their holiday clothes next morning, and to watch those who went to work.

On November 21, which was a play-day and a day on which the appellant had no business at the pit, men who had gone to the colliery intending to work were interfered with by the appellant and had been turned back.

The justices found that on November 19, 20, and 21 the appellant had unlawfully interfered with certain of the workmen employed at Ackton Hall Colliery, and they ordered the appellant to be removed as check-weigher.

The question for the opinion of the Court was whether there was any evidence to support the finding of the justices.

Atherley Jones, *K.C.*, and *J. O. Andrews*, for the appellant. The facts found by the justices do not justify the removal of the appellant from his post of check-weigher. The acts done by him which are said to constitute interference with the workmen within s. 13, sub-s. 4, of the Coal Mines Regulation Act, 1887, were not acts done by him in the performance of his duties as check-weigher, but in a different capacity, namely, as president of the local branch of the miners' association. In order to justify an order of removal, the check-weigher must while performing his duties, and not otherwise, have committed one of the acts enumerated in the section. To say that presiding at a miners' meeting is interfering with the workmen is to give to the language of the section a far wider meaning than was intended, and the result would be that it would become impossible for a check-weigher to take any part in the work of a miners' association. It is to be observed that the corresponding section in the earlier Act, s. 18 of the Coal Mines Regulation Act, 1872, contained the words "or has otherwise misconducted himself"; but these words were intentionally omitted from the Act of 1887 in consequence of the decision in *Prentice* v. *Hall* (1), and their absence strongly supports the contention of the appellant that on the evidence in this case no order

(1) (1877) 37 L. T. 605.

1904

SYKES v. BARRACLOUGH.

for removal ought to have been made. Further, on the true construction of s. 13, sub-s. 4, the only acts done by a check-weigher which justify his removal are acts done at the mine. Here, none of the acts relied on was done at the mine, for the meetings presided over by the appellant were held either at an hotel in the town or outside the pit gates.

Bairstow, for the respondent. The decision of the justices was right. Any act done by a check-weigher which amounts to interference with the workmen is a good ground for his removal, irrespective of the capacity in which or the locality where it was done. The gist of the matter is the interference with the workmen or the interruption of the working of the mine. There was ample evidence to support the finding of the justices in the present case. If it be necessary that the act should be done at the mine, it is submitted that presiding at a pit-gate meeting is an act done "at the mine."

Atherley Jones, K.C., replied.

Cur. adv. vult.

July 15. LORD ALVERSTONE C.J. said that he had read the judgments about to be delivered by Kennedy and Phillimore JJ., and that he had nothing to add to them.

KENNEDY J. read the following judgment:—Whilst I concur in the conclusion at which my Lord and my brother Phillimore have arrived, I wish to state shortly the reasons for my own judgment, as the matter to be decided is one of general importance.

The magistrates have found as a fact that on three out of the five dates charged in the respondent's complaint the appellant, then being a check-weigher, did unlawfully interfere with certain of the workmen employed at the Ackton Hall Colliery, and on this ground, under the provisions of the Coal Mines Regulation Act, 1887, s. 13, sub-ss. 4 and 5, they have made a summary order for the removal of the appellant from his position as check-weigher. "Interference with workmen" is under these sections a specified legal ground of removal, and we can reverse that decision only if there was not in point of

law any evidence to justify the magistrates' finding of fact. These findings in substance are as follows: [The learned judge read the findings set out above.] Now, I cannot say that what is here recorded as having taken place, according to the magistrate's view, on November 20 and 21, at all events cannot as a matter of law be held to constitute "an interference with any of the workmen" within the fair and proper meaning of the statute. It is urged that it ought not to be so regarded substantially on two grounds. First, that the interference with workmen which is intended to be forbidden by the section must be interference of the check-weigher virtute officii, or, at all events, in apparent or professed exercise of the check-weigher's powers or authority as a check-weigher, whereas, it is contended, the appellant in the present case was not engaged in, or claiming to be performing, duties as check-weigher, but was acting as president of the local miners' association. Now I desire, for my part, to say that I should by no means be prepared to justify an order of magistrates removing a check-weigher from his place, merely because either as an official of a miners' association or as a private individual the check-weigher took some part in the legitimate work of a miners' association, and was present or spoke or presided at meetings called together to consider and resolve upon matters affecting the miners' interests or action. It is true that such action may be intended to influence and may influence the conduct of workmen at the mine; but I should not be prepared to hold, nor must I be understood to hold here, that action of that kind is necessarily interference within the meaning of the section. I do not believe that this was the purpose of the enactment in question. But I am equally convinced that the mere fact that the check-weigher charged with the unlawful interference is also an official of the local miners' association, and that the acts charged were done by him when purporting to act as such official, and not when claiming to use authority or perform duties as a check-weigher, does not necessarily constitute an answer to such a charge. As to what conduct is interference which under the terms of this statute constitutes a proper ground for the removal of a check-weigher, it seems to me that

1904

SYKES v. BARRACLOUGH.

Kennedy J.

the question in each case must turn upon the particular circumstances of the case and upon the special facts. Interference is not a word of art or capable of precise definition; but there is nothing in the section which limits the unlawful interference to acts which the check-weigher does or purports to do in connection with or by virtue of his duties in that office.

With regard to the locality of the acts and to the further contention of the appellant that the section does, if it is properly construed, limit the objectionable interference to interference within the gates, or, to use the phrase which appears in a later part of the section, to interference "at the mine," I do not agree with this view as a matter of construction. The very fact that in regard to conduct of the check-weigher, which is to the detriment of the owner, agent, or manager, the section does expressly limit the area to the mine, and in the same section does not in terms put any such limitation to interference with workmen, appears to me to make very strongly against the propriety of implying it in the latter case; nor is it in my view a reasonable construction looking at the subject-matter of the enactment. A safeguard against an abuse of the influence and power over the workmen which a check-weigher's office gives him appears to me to be quite as reasonably necessary in regard to interference with workmen at or outside as within the pit gates.

Reference was made in the course of the argument to the case of *Prentice* v. *Hall*. (1) I think that the effect of the judgments in that case as well as the change in the wording of the Act of 1887 from the wording of the Coal Mines Regulation Act, 1872, under which that case was decided, is opposed to the contention of the appellant in the present case on both the points with which I have dealt. The act of the check-weigher, which in that case was held to justify an order to remove him, was the intimidation of a workman. It is true that the intimidation of the workman was in one of the branches of the colliery; but there is no suggestion in the case as reported that the judgment would have been different if it had been from outside the pit gate, or that the act of intimida-

(1) 37 L. T. 605.

tion was or purported to be in any way connected with the performance of the check-weigher's duties, or under colour of his authority as a check-weigher. It is true that both the judges in the Divisional Court lay stress on the words "otherwise misconducted himself," which are not to be found in the Act of 1887. But the change of language is rather against the appellant's contention here, for into the Act of 1887, whilst these words are omitted, the words "interfere with any of the workmen" are introduced; and the just inference as to the intent of the Legislature appears to me to be that whilst other "misconduct" of a check-weigher other than that which is specified in the section is not to afford ground for his removal, misconduct which consists in "interference with a workman" is still to be treated as proper ground for removal.

For these reasons I cannot say that the facts found by the magistrate do not in point of law constitute an "interference" within the meaning of the statute.

PHILLIMORE J. read the following judgment:—This is an appeal from an order made by justices of the peace for the West Riding of Yorkshire. A complaint was on January 16 last preferred against the respondent for that he on November 13, 14, 19, 20, and 21, 1903, being check-weigher at the Ackton Hall Colliery, unlawfully interfered with certain of the workmen employed in the mine, and unlawfully interfered with the management of the mine. The object of this complaint, which was made under the Coal Mines Regulations Act, 1887, was to procure the removal of the appellant from his position as check-weigher. On February 20 the justices, being satisfied that the appellant did so interfere, made an order for his removal, with costs, but stated the case which forms the subject of this appeal. They did not find adversely to the appellant with regard to the charges on November 13 and 14, but with regard to the three later days they found that the appellant did unlawfully interfere with certain of the workmen employed at the Ackton Hall Colliery. They gave their findings in detail, and my brother Kennedy has summarized them. The question upon which the opinion of the Court was

1904

SYKES v. BARRACLOUGH.

Phillimore J.

desired was whether there was any evidence to support these findings. The provisions of the Act as to the removal of a check-weigher are as follows. Sect. 13, sub-s. 3: "A check-weigher shall not be authorized in any way to impede or interrupt the working of the mine, or to interfere with the weighing or with any of the workmen or with the management of the mine." Sub-s. 4: "If the owner, agent, or manager of the mine desires the removal of a check-weigher on the ground that the check-weigher has impeded or interrupted the working of the mine or interfered with the weighing or with any of the workmen or with the management of the mine, or has at the mine, to the detriment of the owner, agent, or manager, done anything beyond taking such account determining such deduction, or giving such information as aforesaid, he may complain to a Court of summary jurisdiction, who, if of opinion that the owner, agent, or manager shews sufficient primâ facie grounds for the removal of the check-weigher, shall call on the check-weigher to shew cause against his removal." It was contended on behalf of the appellant that these provisions relate solely to interference or misconduct by the check-weigher in his capacity of check-weigher or at any rate only to something done at the mine.

It was pointed out that the words "or otherwise misconducted himself" in the older Act had been repealed, and in lieu the words "or has at the mine to the detriment of the owner, &c., done anything beyond taking such account, &c.," had been enacted. But these are not the only words of addition in the new Act. In the older Act (35 & 36 Vict. c. 76, s. 18) the grounds for removal were, if a check-weigher has "impeded or interrupted the working of the mine or interfered with the weighing, or has otherwise misconducted himself."

In the present Act we have the words "or has otherwise misconducted himself" taken out; but we have three new grounds inserted—interference with any of the workmen, interference with the management of the mine, and doing anything at the mine to the detriment of the owner, &c. It was contended on behalf of the respondent that it might easily happen

that a person in the position of a check-weigher could use his influence and knowledge to interfere with the workmen in a manner injurious to the mine and its management, and that it was not necessary in law that he should do the acts complained of at the mine; that it was a question of fact for the justices whether he had interfered with the workmen. The justices set out the evidence on both sides as part of the case. From this I gather that the act complained of on November 19 was an inflammatory speech and advice or direction given to four miners at a meeting held at the Featherstone Hotel; that the acts complained of on the 20th and 21st were inflammatory speeches and threats at meetings held at the pit gate. If it be necessary to constitute a cause of removal that the action of which a complaint is made should be done as contended at the mine, I do not think that what happened on the 19th could be said to be done at the mine; but I think that the justices might find that the actions of the appellant on the 20th and 21st were acts of interference with the workmen. A pit-gate meeting was upon the evidence a meeting held on the road outside the entrance to the mine yard at a point which every workman must pass, and where any workman upon whom influence or intimidation might be brought to bear could be stopped. I think that acts done at such a meeting were acts done at the mine, and though not done by the appellant in his capacity of check-weigher were acts of serious interference. It was suggested that the order could not be supported unless the justices were right in their findings as to all three days; but this was not a conviction for misdemeanour to which the rule in *O'Connell* v. *Reg.* (1) would apply. It is a proceeding on behalf of the manager of the mine to get rid of an official appointed by the men who has misused his official position and his statutory privileges to the detriment of the mine. An order for removal upon a proper case would be ex debito justitiæ whether the objectionable conduct was upon two days or three. It becomes, therefore, unnecessary to decide whether or not a check-weigher may be removed from his office by reason of acts of interference not done at the mine. I am, however, of

(1) (1844) 11 Cl. & F. 155.

1904

STEAD v. BARRACLOUGH.

Phillimore J.

opinion that there is no such local limitation. Sect. 13, sub-s. 3, enumerates the acts which a check-weigher has no authority to do; sub-s. 4 says that if he does any of these acts he may be removed from his office, and also that he may be removed upon additional grounds—namely, doing at the mine acts to the detriment of the mine-owner, agent, or manager. These are words of extension, not of limitation.

It was, therefore, open to the justices to find that the action of the appellant on November 19 (though it did not take place "at the mine," and though it was not as check-weigher, but as president of a miners' association that he spoke) was an unlawful interference with certain of the workmen employed at the mine.

The appeal will be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *C. Russell & Co., for C. E. S. Lowden, Pontefract.*

Solicitors for respondent: *Moxon & Barker, Pontefract.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1904
July 25.

CHARLES DUVAL & CO., LIMITED *v.* GANS AND ANOTHER.

Practice—Writ of Summons—Service out of Jurisdiction—Contract "which, according to the Terms thereof, ought to be performed within the Jurisdiction"—Place of Payment—Order XI., *r.* 1 (*e*).

Where, in an action for the price of goods sold by sellers in England to foreigners resident abroad, it appeared that, though the contract of sale did not expressly state where payment for the goods was to be made, the implication which, under the circumstances, reasonably arose from the contract was that it should be made in England:—

Held, that leave to serve notice of the writ upon the defendants out of the jurisdiction was properly given.

Comber v. *Leyland*, [1898] A. C. 524, discussed.

Reynolds v. *Coleman*, (1887) 36 Ch. D. 453, and *Rein* v. *Stein*, [1892] 1 Q. B. 753, followed.

APPEAL from an order of Bucknill J. at chambers refusing to set aside the writ and service thereof as after mentioned.

The plaintiffs were a limited company registered in England, who carried on business as shippers of champagne, their registered offices being in Lime Street in the City of London. The defendants, who were citizens of and domiciled in the United States, carried on business as wine merchants in New York.

By a letter purporting to be written at the offices of the plaintiff company in Lime Street, London, and dated January 1, 1902, which letter was signed by two directors of the plaintiff company on their behalf, and handed to the defendants in New York by one of those directors, and by a letter of the same date, in answer thereto, addressed to the plaintiff company in London, and handed to the before-mentioned director in New York, an agreement was made between the plaintiffs and defendants, whereby the plaintiffs appointed the defendants their sole agents for the United States, Canada, and Cuba for the sale of certain qualities of their champagne upon certain terms specified as to minimum

C. A. 1904

CHARLES DUVAL & CO., LIMITED v. GANS.

quantity of wine to be taken annually by the defendants and other matters. The different qualities of wine specified in the agreement were to be shipped to the defendants in America as ordered by them, F.O.B. at Havre, at certain prices stated, subject to certain allowances to be made for advertising expenses and other matters, and the defendants were to be allowed a cash discount upon the net prices so arrived at of 5 per cent. on all payments on invoices made within forty-five days from date of arrival, and an extra discount of 2 per cent. if paid within seven days from date of arrival. (1) There was no express stipulation as to the place where payment of the price of the wines shipped under the agreement was to be made.

The action was brought for the price of champagne shipped by the plaintiffs to the defendants in America under the above-mentioned agreement, and also for damages for refusing to accept certain other wine ordered of the plaintiffs under that agreement, and for an account.

It appeared that the price of wines previously shipped to the defendants under the agreement had been paid by drafts on a London bank sent from New York to the plaintiffs. The plaintiffs had obtained leave to issue a writ for service on the defendants by serving notice thereof out of the jurisdiction, and had served the same on the defendants accordingly. The defendants applied to Bucknill J. at chambers to set aside the writ and notice, and the service thereof. The learned judge refused the application.

A. Powell, K.C., and *Lincoln Reed*, for the defendants. This case does not come within the terms of Order XI., r. 1 (*e*). It has been held by the House of Lords in *Comber* v. *Leyland* (2) that, to bring a case within the rule, it is not enough that the contract, according to its terms, may be performed either within or without the jurisdiction; it must be such as, according

(1) It will be observed that, though the agreement (resembling in this respect other forms now common in several trades) purported to appoint the defendants agents for the plaintiffs, in legal contemplation the relation appears to have been that of sellers and buyers, and not that of principal and agent.

(2) [1898] A. C. 524.

to its terms, can only be performed within the jurisdiction. There is no provision here as to the place where the payment for the wine is to be made. That being so, the debt stands in the same position as any other debt in respect of the price of goods, and is not payable in any particular place only. In *Comber* v. *Leyland* (1) Lord Halsbury L.C. said that he could not assent to the proposition that a plaintiff could try to make out the particular circumstances which give the Courts power to allow service of writs out of the jurisdiction, and, on failing to do that, say, "There was the general relation between us of buyer and seller, and therefore we can apply the general principle of English law, namely, that the debtor is to seek out his creditor and pay him where he lives, and, as the creditor lives in England, that imports that some part of the contract is to be performed in England, and the breach of it is established by the non-payment in this country." It is submitted that cases like *Reynolds* v. *Coleman* (2) and *Rein* v. *Stein* (3), which were decided before the decision of the House of Lords in *Comber* v. *Leyland* (1), are no longer authorities.

[They also cited *Bell & Co.* v. *Antwerp, London and Brazil Line* (4); *The Eider*. (5)]

Norman Craig, for the plaintiffs. Upon the true construction of the contract in this case, the reasonable implication, having regard to the circumstances, is that the payment for the wine was to be made to the plaintiffs in this country. The effect of the decisions in *Reynolds* v. *Coleman* (2) and *Rein* v. *Stein* (3) is that, in order that a case may come within Order XI., r. 1 (*e*), it is not essential that there should be an express stipulation that payment shall be made within the jurisdiction, but that it is sufficient, if by necessary implication, having regard to the terms of the contract and the circumstances of the case, it appears that the intention was that payment should be so made. The decision of the House of Lords in *Comber* v. *Leyland* (1) was based on the fact that by the express terms of the contract the payment in that case

(1) [1898] A. C. 524.
(2) 36 Ch. D. 453.
(3) [1892] 1 Q. B. 753.
(4) [1891] 1 Q. B. 103.
(5) [1893] P. 119.

C. A. 1904

CHARLES DUVAL & CO., LIMITED v. GANS.

was to be made in Pernambuco by posting letters there containing remittances by bank bills. There is nothing in any of the judgments in that case which affects the principles laid down in the class of cases, of which *Reynolds* v. *Coleman* (1) and *Rein* v. *Stein* (2) are members. [He also cited *Robey* v. *Snaefell Mining Co.* (3); *Hassall* v. *Lawrence* (4); *Hoerter* v. *Hanover Caoutchouc, &c., Works.* (5)]

A. Powell, K.C., in reply.

STIRLING L.J. In my judgment this appeal fails. By an agreement, which appears to have been made in New York, the plaintiffs, a limited company in England, whose registered offices are in the City, appointed the defendants, who are wine merchants in New York, sole agents for the United States, Canada, and Cuba for the sale of certain qualities of their champagne; and various stipulations are contained in the agreement with regard to the prices at which the wines were to be shipped, the discount to be allowed to the defendants, and other matters usually dealt with in contracts of such a nature. There is no express provision with regard to the place where the net price of the wine shipped, after deducting the allowances provided for by the contract, is to be paid. The defendants having failed to pay the price of certain wine shipped to them under this agreement, the plaintiffs obtained leave to issue the writ in this action against them, and to serve the same by serving notice of it, out of the jurisdiction, on the ground that the case came within Order XI., r. 1 (*e*). The objection is taken by the defendants that the action is not, within the meaning of that rule, founded upon any breach within the jurisdiction of a contract "which, according to the terms thereof, ought to be performed within the jurisdiction." I think that, regard being had to the decisions of the Court of Appeal on this subject, the leave for service out of the jurisdiction in this case was properly given. The meaning of the rule had to be considered in the case of *Reynolds* v. *Coleman*. (1)

(1) 36 Ch. D. 453.
(2) [1892] 1 Q. B. 753.
(3) (1887) 20 Q. B. D. 152.
(4) (1887) 4 Times L. R. 23.
(5) (1893) 10 Times L. R. 22.

In that case Cotton L.J. said in giving judgment: "The question we have to consider is this, What is the meaning of, 'which, according to the terms thereof, ought to be performed within the jurisdiction'? It was said by the appellant to mean that it must be an express term of the contract that it should be performed within the United Kingdom. In my opinion that is not the true construction. The difficulty arises from the words 'according to the terms thereof,' but in my opinion these words mean that you must look at the contract and at the facts which existed at the time when the contract was made, and then determine whether, having regard to the terms, the contract was one which ought to be performed within the jurisdiction, and do not mean that there must be an express provision that the contract is to be performed within the jurisdiction." The view so taken was followed and adhered to in *Rein* v. *Stein* (1), which was a case very similar to the present. The action there was for the price of goods consigned by the plaintiff, a merchant in England, for sale in Germany by the defendant, a German subject carrying on business in Germany. There was no express stipulation as to the place of payment for the goods, but it appeared that, according to the course of business in similar transactions between the plaintiff and the defendant, such payment would be made in England. It was held that leave might be given to issue a writ for service out of the jurisdiction. Lindley L.J., in giving judgment, after quoting the passage which I have read from the judgment in *Reynolds* v. *Coleman* (2), proceeded as follows: "Now, before I part with that case, I will make another observation on the construction of clause (*e*) of Order XI., r. 1. I do not understand that it is the whole of the contract that has to be performed within the jurisdiction. It is sufficient if some part of it is to be performed within the jurisdiction, and if there is a breach of that part of it within the jurisdiction." He then referred to the case of *Robey* v. *Snaefell Mining Co.* (3), and came to the conclusion that, although all the duties of the defendant under the contract, except the duty

(1) [1892] 1 Q. B. 753. (2) 36 Ch. D. 453.
(3) 20 Q. B. D. 152.

C. A. 1904

CHARLES DUVAL & CO., LIMITED v. GANS.

Stirling L.J.

of paying the plaintiff, were to be performed abroad, payment was, under the contract, to be made in England, and therefore the case came within the rule. The Lord Justice said: "I should infer that payment was to be made in London from the circumstances existing at the time when the letters were written; but it does so happen that the course of business pursued by the defendant since the dates of those letters leads to the inference that part of the defendants' duty under this contract was to pay the plaintiffs in England." In the subsequent case of *The Eider* (1), which was a case of salvage, the decision was that, there being no obligation to pay the salvage money within the jurisdiction, the case did not fall within the meaning of Order XI., r. 1 (*e*). But all the members of the Court dealt with the case as turning on its own special circumstances there involved, and said nothing to impugn the rule laid down in *Reynolds* v. *Coleman* (2) and applied in *Rein* v. *Stein*. (3) Lord Esher M.R. said that the Court had so to construe the contract "as Cotton L.J. said in *Reynolds* v. *Coleman* (2) as to see whether, within the true meaning of the rule, the payment here according to the terms of the contract ought to be performed within the jurisdiction." Then, after saying that in the circumstances he should say the contract was a German contract, he proceeded: "The parties to that contract are now abroad, and neither the plaintiffs nor defendants are now in England. The contract is to perform work to that ship; whether it be called salvage work, or not, seems to be immaterial. It is for work to be done to that ship, and payment is to be made for that work. There is no place specified in the contract for the payment. What, then, is the ordinary rule? That the debtor must follow his creditor, and must pay where his creditor is." Lindley L.J., after referring to *Reynolds* v. *Coleman* (2) and to *Rein* v. *Stein* (3), without in any way departing from the rule as there laid down, said: "The question is whether there is any obligation on the defendants to pay this particular sum in this country. We must look to the contract, to the parties to it, and to the

(1) [1893] P. 119. (2) 36 Ch. D. 453.
(3) [1892] 1 Q. B. 753.

circumstances in which it was entered into." Bowen L.J. used language to very much the same effect. I have referred to the case of *The Eider* (1) somewhat particularly, because it was referred to in the case of *Comber* v. *Leyland* (2) in the House of Lords, and approved. *Comber* v. *Leyland* (2) was a case of a somewhat special character. There was a definite agreement in that case as to the mode of payment for the goods. Payment was to be made by remitting the amount payable in first class bank bills on England, not exceeding ninety days' sight, and it was held that that contract was to be performed by putting into the post-office at Pernambuco a letter containing such bank bills. On that ground it was held that the payment in that case was not to be made in England, but in the special mode provided for by the contract, and therefore the case was not one of a breach of a contract which, according to the terms thereof, ought to be performed within the jurisdiction. In that case *Bell & Co.* v. *Antwerp, London and Brazil Line* (3) and *The Eider* (1) were referred to, but nothing was said as to overruling the series of decisions of which *Reynolds* v. *Coleman* (4) and *Rein* v. *Stein* (5) form part, and I do not think that any of the learned Lords who gave judgment in that case said anything really inconsistent with those decisions. They certainly were not expressly overruled, and the case of *The Eider* (1), in which the doctrine of *Reynolds* v. *Coleman* (4) and *Rein* v. *Stein* (5) was approved of, was itself approved of in the House of Lords. I do not think, regard being had to the long series of cases in which the principle laid down in *Reynolds* v. *Coleman* (4) was followed, it is open to this Court now to depart from it.

MATHEW L.J. I am of the same opinion. It appears to me clear, upon the terms of the contract in this case, that the payment of the price of the wine was intended to be made in England. The plaintiffs are a limited company, having their registered office in London, which would appear to be the

(1) [1893] P. 119.
(2) [1898] A. C. 524.
(3) [1891] 1 Q. B. 103.
(4) 36 Ch. D. 453.
(5) [1892] 1 Q. B. 753.

C. A. 1904

CHARLES DUVAL & CO., LIMITED v. GANS.

Mathew L.J.

only place where, in point of law, they can be considered as locally existing. Where a contract like that in the present case is made with such a company, and no place of payment is specified therein, it appears to me that, in the absence of anything to the contrary, the intention may be inferred that the payment should be made to the company where its office is situated. A limited company is not for this purpose on the same footing as an ordinary individual, who may be itinerant, and at any moment change his residence. I do not think that under this contract the plaintiffs could claim to be paid, or the defendants claim to pay, the price of the wine anywhere but in this country. It appears to me that our decision in this case is entirely consistent with many authorities which shew that it is not necessary, in order to bring a case within the rule, that there should be an express stipulation that payment should be made in England; but the Court may gather what by necessary implication, having regard to the nature of the contract, and the circumstances under which it was entered into, the parties must have meant. For these reasons I think the appeal must be dismissed.

Appeal dismissed.

Solicitor for plaintiffs: *Robert Rodgers.*
Solicitors for defendants: *Wetherfield, Son & Baines.*

E. L.

BOW *v.* HART.

1904
July 7.

County Court—Jurisdiction—Title to a Franchise—Infringement of Trade-mark—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 56—*Patents, Designs, and Trade Marks Acts*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 75, 76, 90, 117; 1888 (51 & 52 *Vict. c.* 50), *s.* 18.

A registered trade-mark is not a "franchise" within the meaning of the proviso in s. 56 of the County Courts Act, 1888, and a county court has jurisdiction to try an action for the infringement of a trade-mark, notwithstanding that the validity of the trade-mark is in dispute, and that the defendant has given notice of his intention to apply to the High Court under s. 90 of the Patents, Designs, and Trade Marks Act, 1883, to have it expunged from the register.

APPEAL from a decision of the judge of the Rochester County Court.

The particulars of claim shewed that the action was brought in respect of an alleged infringement by the defendant of the plaintiff's registered trade-mark, and the plaintiff claimed an injunction to restrain the defendant, his travellers, servants, and agents, from infringing the trade-mark, and also an account or damages. The defendant gave notice that at the hearing he would object to the jurisdiction of the Court to try the plaintiff's claim, and also that he intended to contest the validity of the plaintiff's trade-mark and to apply to the High Court to have it expunged from the register of trade-marks. At the hearing objection was taken on the part of the defendant to the jurisdiction on the grounds that a trade-mark was a franchise, and that actions for the infringement of trade-marks were similar to actions for the infringement of patents, over which the High Court alone has jurisdiction.

The learned judge heard the evidence, but declined to give any judgment. His own note of his decision was in the following terms: "I decline to give any judgment. I doubt whether the case of *Reg.* v. *Halifax County Court Judge* (1) governs this case, as (1.) I do not think registration of a trade-mark is a

(1) [1891] 2 Q. B. 263.

1904

BOW v. HART.

franchise, and (2.) there are no special provisions as to procedure in the Act of 1883 in trade-mark actions applicable only to the High Court, though s. 18 of the Act of 1888 being in pari materiâ (as to trade-marks) to s. 31 of the Act of 1883 (as to patents) points strongly to the conclusion that actions for infringements of trade-marks can be brought only in the High Court. But assuming that an action for infringement of a trade-mark could be brought in the county court where no question as to the right of the plaintiff to the use of the trade-mark is in issue, I hold that the defence raised by the defendant in this case does put the plaintiff's right to the use of his trade-mark in issue, and that a decision on that point would in effect be a decision as to his right to have his mark retained on the register, which is a question which I have no jurisdiction to decide. I therefore make an order as follows: "It appearing that the defence to this action puts in issue the question of the plaintiff's right to the exclusive use of his registered trade-mark and his right to have such trade-mark continued on the register, which is a question which this Court has no jurisdiction to decide, I do not think fit to make any order in this action."

The plaintiff appealed.

Spokes, for the plaintiff. The county court judge had jurisdiction. Sect. 56 of the County Courts Act, 1888, gives the county court jurisdiction in personal actions where the claim does not exceed 50*l.*, and the proviso excepts "any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise shall be in question. . . ." Of the exceptions in the proviso none but "franchise" could possibly apply to the present action; but a trade-mark is not a "franchise": it is not a privilege granted by the Crown in respect of its prerogative, which is the definition of a franchise, as used in s. 56, adopted in *Reg.* v. *Halifax County Court Judge*. (1) Under s. 76 of the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), the registration of a trade-mark is primâ facie evidence of a right to its exclusive use, and after five years is conclusive evidence thereof;

(1) [1891] 2 Q. B. 263.

such a right is a right of property, which the owner is entitled to have protected by an injunction in the ordinary way, and it is not a franchise. It is true that by s. 117 of the Act of 1883 "the Court" means the High Court; but that does not affect the jurisdiction conferred on the county court by s. 56 of the County Courts Act, 1888. Under s. 18 of the Patents, Designs, and Trade Marks Act of 1888, "the Court or a judge" may certify that the right to the exclusive use of a trade-mark came in question, and it may be contended that by virtue of s. 117 of the Patents, Designs, and Trade Marks Act, 1883, the power of certifying is confined to the High Court. The answer to such an objection is that under s. 18 the plaintiff has an option as to applying for the certificate, and need not do so, but that, if he does apply for it, he must make his application in the High Court.

Beddall, for the defendant. The county court judge was right in holding that he had no jurisdiction. By virtue of s. 117 of the Patents, Designs, and Trade Marks Act, 1883, "Court" means the High Court equally whether the title to a patent or to a trade-mark is the subject of dispute. A trade-mark is a franchise within the meaning of s. 56 of the County Courts Act, 1888. It was upon the ground that a patent was a franchise that *Reg.* v. *Halifax County Court Judge* (1) was decided in the Divisional Court (2); the Court of Appeal approved that view, but also expressed an opinion that the county court procedure was inapplicable in patent actions. Under ss. 75, 76 of the Patents, Designs, and Trade Marks Act, 1883, the exclusive use of a trade-mark is a monopoly; a trade-mark is therefore as much a franchise as is a patent.

[LORD ALVERSTONE C.J. A trade-mark is founded on property, and the object of registration is to protect the property.]

The statute gives the proprietor of a trade-mark an exclusive privilege, and the trade-mark is therefore a franchise. It is immaterial that in the case of a trade-mark the exclusive privilege is granted by Parliament, and in the case of a patent by the Crown.

(1) [1891] 2 Q. B. 263. (2) [1891] 1 Q. B. 793.

1904

Bow v. Hart.

Lord Alverstone C.J. This case raises a question of considerable importance and difficulty, and I am anxious that the conclusion to which I have come in favour of the jurisdiction of the county court should be reviewed in the Court of Appeal. The learned county court judge has not stated the point raised in the case in a form which enables us to say that he has jurisdiction. He says that the case of *Reg.* v. *Halifax County Court Judge* (1) does not apply—in which view I agree; also that s. 18 of the Act of 1888 being in pari materiâ (as to trade-marks) with s. 31 of the Act of 1883 (as to patents) points to the conclusion that actions for infringement of trade-marks can be brought only in the High Court; but then he goes on to say that he makes no order because a decision on the point raised by the defence would involve a decision of the plaintiff's right to have his trade-mark retained on the register. I cannot, speaking for myself, appreciate this point of view, because it seems to me that, if the statute gives the county court judge jurisdiction over the action brought by the plaintiff, the question raised by the defence cannot take away that jurisdiction.

Primarily the jurisdiction of the county court is conferred by s. 56 of the County Courts Act, 1888, which gives jurisdiction over all personal actions where the debt, demand, or damage claimed is not more than 50*l.*, excepting, however (inter alia), actions in which the title to any franchise is in question. The present action was brought in respect of the alleged infringement of the plaintiff's trade-mark, and the defendant by way of defence gave notice that he was going to contest the validity of the trade-mark and to apply to a judge of the High Court to have it expunged from the register. The question is whether under these circumstances the county court judge had jurisdiction. During the argument we inquired whether there was any authority upon the question whether a registered trade-mark is a franchise within the meaning of s. 56 of the County Courts Act, 1888, but no authority has been brought to our notice. I certainly never heard it contended before that a trade-mark was a franchise, and the case of *Reg.* v. *Halifax County Court Judge* (1), so far as it deals with the question of

(1) [1891] 2 Q. B. 263.

1904

Bow v. Hart.

Lord Alverstone C.J.

a franchise, is certainly not an authority to that effect. The right to the exclusive use of a trade-mark is a right based on property; it is a right to have property—that is, the right to the use of the trade-mark—protected; it is not analogous in its nature to a franchise, for it does not arise by reason of any grant from the Crown, the right to the registration of a trade-mark being a right conferred by statute. I think, therefore, that it is impossible to hold that the jurisdiction of the county court is excluded in the case of an action for infringement of a trade-mark on the ground that a trade-mark falls within the term "franchise."

A difficulty, however, does arise on the second ground, similar to that on which it was held in *Reg.* v. *Halifax County Court Judge* (1) that an action for the infringement of a patent, where the validity of the patent was contested, was not within the county court jurisdiction, because of the special machinery which, as Lopes L.J. points out, is provided for the trial of patent actions, and which is only applicable to a trial in the High Court. This point, of course, is wholly independent of the question of franchise. The difficulty which I feel arises from the language of s. 18 of the Patents, Designs, and Trade Marks Act, 1888, which provides that "in an action for infringement of a registered trade-mark the Court or a judge may certify that the right to the exclusive use of the trade-mark came in question, and if the Court or a judge so certifies, then in any subsequent action for infringement the plaintiff in that action, on obtaining a final order or judgment in his favour, shall have his full costs, charges, and expenses as between solicitor and client, unless the Court or judge trying the subsequent action certifies that he ought not to have the same." That provision is in terms the same as s. 31 of the Patents, Designs, and Trade Marks Act, 1883, which made the same provision for a certificate in the case of an action for infringement of a patent that s. 18 of the Act of 1888 makes in the case of an action for infringement of a trade-mark. No doubt s. 31 was one of the sections referred to by Lopes L.J. in *Reg.* v. *Halifax County Court Judge* (1), and I confess to

(1) [1891] 2 Q. B. 263.

1904

BOW v. HART.

Lord Alverstone C.J.

feeling some doubt whether the provisions of s. 18 of the Act of 1888 are not sufficient to shew that the special machinery provided for the trial of trade-mark actions brings in the second ground upon which it was held that in the case of a patent the county court had no jurisdiction. But on the whole I do not think that the difficulty caused by s. 18 is sufficient to lead me to hold that an action for infringement of a trade-mark is outside the jurisdiction of the county court. I do not attach much weight to the contention that s. 18 is merely optional, and that the plaintiff may, if he pleases, waive his rights under it. I recognise the force of the objection that one of the parties might be successful in the county court, and the other in the High Court proceedings, and the further difficulty that the power given by s. 90 of the Act of 1883 to expunge or vary the entry in the register is clearly confined to the High Court, so that a plaintiff might succeed in the county court, and a defendant in the High Court. But as I am of opinion that s. 56 of the County Courts Act, 1888, does not exclude trade-mark actions from the county court jurisdiction, and that the principle of *Reg.* v. *Halifax County Court Judge* (1) only applies to trade-marks to the limited extent which I have indicated, and as there is power in the High Court to remove the action from the county court (which certainly ought to be exercised in the present case if desired by the defendant, because effect can only be given to a successful defence by expunging the entry in the register, which the High Court alone has jurisdiction to do), I have come to the conclusion that the county court judge had jurisdiction to hear this action, and the appeal must therefore be allowed. The case is, however, one of importance, and there will be leave to appeal.

KENNEDY J. I am of the same opinion. I do not think that a trade-mark is in any sense a franchise, and therefore this is a case in which primâ facie the county court had jurisdiction, and the plaintiff had a right to require his case to be heard. The defendant, however, raised by his defence a matter over which the county court clearly had no jurisdiction, and he

(1) [1891] 2 Q. B. 263.

suggested that the county court had no jurisdiction over the action at all, because it must have been intended that all the legislation as to trade-marks should be enforced only in the High Court. But I cannot quite assent to that view. There is primâ facie jurisdiction in a county court judge under s. 56 of the County Courts Act, 1888, to hear all but specially excepted actions, and this action is not in its nature one of those excepted from the jurisdiction, although I quite see the difficulty in working out under the county court procedure such a defence as that which has been raised. I agree with my Lord that, where express statutory jurisdiction is primâ facie given to the county court, it ought not to be taken away except upon compulsion. I am not forgetful of the difficulty of the suggested conflict of jurisdiction, if, after the county court had decided in favour of the plaintiff, the High Court were to expunge the entry of his trade-mark from the register; but there is this practical answer to it, that the defendant can, under s. 126 of the County Courts Act, 1888, apply for the removal of the case into the High Court by certiorari or otherwise, and as the defendant can only get the relief he is seeking in the High Court, and as the defence is clearly relevant to the plaintiff's claim, I think that such an application if made ought not to be refused. I agree, therefore, that this appeal should be allowed.

Appeal allowed. Leave to appeal.

Solicitors for plaintiff: *Carter & Bell.*

Solicitors for defendant: *Churchman & Winser.*

W. J. B.

C. A.
1904
July 22.

[IN THE COURT OF APPEAL.]

In re MACOUN.

Bankruptcy—Petitioning Creditor—Debt due to a Partnership—Dissolution of Partnership—Receiver appointed in Partnership Action—Assignment of Judgment Debt—Leave to Receiver to issue Execution—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 6.

On the dissolution of a firm of stockbrokers by the death of one of the partners the partnership assets, including a debt due to the late firm in respect of certain Stock Exchange transactions, were assigned by the surviving partners to L. for the purpose of winding up the partnership, and notice of the assignment was served on the debtor. L. then recovered judgment for the amount of the debt. Subsequently an action was commenced in the Chancery Division for the winding-up of the partnership, and in that action a receiver was appointed of the partnership assets. The receiver took an assignment of the judgment debt from L., and obtained leave to issue execution. He then served a bankruptcy notice on the debtor, and on the failure of the debtor to comply with the notice a bankruptcy petition was presented against him by the receiver, the surviving partners, and the personal representatives of the deceased partner:—

Held, that inasmuch as the receiver had obtained an assignment of the judgment debt, he was a creditor entitled to present a bankruptcy petition.

In re Sacker, (1888) 22 Q. B. D. 179, only decides that a receiver who cannot sue in his own name cannot be a good petitioning creditor. Dictum of Lord Esher in that case dissented from.

Appeal against a receiving order in bankruptcy.

In 1901 the debtor, J. R. Macoun, owed money to Messrs. Montagu Young & Co., a firm of stockbrokers, in respect of certain Stock Exchange transactions. In June, 1902, one of the partners in this firm, Mr. Maund, died, and thereupon the partnership determined. In July, 1902, the surviving partners, Mr. Montagu Young and Mr. Kolckmann, assigned all the partnership assets to one Levett for the purpose of collecting and receiving the same and winding up the affairs of the partnership, and notice of this assignment was served upon the debtor. On November 17, 1902, Levett obtained judgment against the debtor for 662*l.* 16*s.* 7*d.* and costs in respect of the debt due from the debtor to the firm of Montagu Young & Co.

In June, 1903, an action was commenced in the Chancery Division for the winding-up of the partnership, and by an order made in that action by Swinfen Eady J. dated August 12, 1903, Mr. W. B. Peat was appointed receiver of the partnership assets. On October 31, 1903, Peat took from Levett an assignment of the judgment debt due from the debtor to Messrs. Montagu Young & Co., and on November 13 he obtained the leave of the Court to issue execution on the judgment. On January 11, 1904, a bankruptcy notice was served upon the debtor in respect of this judgment debt, and on his failure to comply with this notice, on March 9, a bankruptcy petition was presented against him by Peat, the surviving partners of the firm of Montagu Young & Co., and the personal representatives of the deceased partner. The petition was heard on May 20. The debtor objected, on the principle of *In re Sacker* (1), that none of the petitioners had any legal right to present the petition; but the registrar overruled the objection and made a receiving order.

The debtor appealed.

Hansell and *Holloway*, for the debtor. This is not a good petitioning creditor's debt within s. 6 of the Bankruptcy Act, 1883, because none of the petitioners has any title to present the petition. Peat is not a proper petitioner, because there was no debt due to him either at law or in equity. He is in no sense a trustee for the persons to whom the debt was due; he is an officer of the Court whose aid they have chosen to invoke. He has no interest in the matter, and he has to account for the debt to the Court. The assignment of the judgment debt does not give him any additional rights, because he was already appointed by the Court to get in the debts. The addition of the other petitioners does not cure the defect, for they are not entitled to the judgment. Even where the receiver under the authority of the Court can sue in his own name, he holds the debt subject to the direction of the Court, and not for his own benefit, and therefore is not a good petitioning creditor: per Lord Esher in *In re Sacker*. (2)

(1) 22 Q. B. D. 179.

(1) 22 Q. B. D. 179, 183.

C. A. 1904

MACOUN, *In re.*

[VAUGHAN WILLIAMS L.J. Those observations of Lord Esher were not necessary to the decision of the case.]

They were part of the decision because he was construing s. 6 of the Bankruptcy Act, which is a penal section, and he says that the trustee must have some beneficial interest in the debt. *Ex parte Harris* (1) is distinguishable on the ground stated by Lord Esher. There a bill of exchange was handed to Harris as auctioneer, and therefore he had a beneficial interest in the proceeds of the bill.

[VAUGHAN WILLIAMS L.J. Why should not a bare trustee be a petitioning creditor?]

Because owing to the serious nature of bankruptcy it is essential that the persons who take the proceedings shall be seriously interested.

[VAUGHAN WILLIAMS L.J. referred to *Ex parte Culley*. (2)]

Muir Mackenzie, for the petitioning creditors.

VAUGHAN WILLIAMS L.J. I think that the appeal fails. There is undoubtedly a good deal in Lord Esher's judgment in *In re Sacker* (3) which does suggest—I think I may go further and say which does positively assert—that in the hypothetical case which he puts there of a receiver being able to bring an action at law in his own name he would not be entitled to become a petitioning creditor because he does not come within the description of a petitioning creditor under the words of s. 6 of the Bankruptcy Act, 1883.

I think those words go very far to cover the proposition for which Mr. Hansell contended; but it was not really necessary for the case which was before the Court of Appeal that this question should have been determined—that is, the question whether a receiver having a title to sue at law could be a good petitioning creditor. It is plain from the judgments, I think, of each of the Lords Justices that in that case the position of things was such that it was perfectly impossible for the receiver to bring an action to recover the debt either at law or in equity; and therefore I think we must treat these observations

(1) (1876) 2 Ch. D. 423. (2) (1878) 9 Ch. D. 307.
(3) 22 Q. B. D. 179.

of Lord Esher as obiter, and one can only look at the case as having decided that a receiver who could not sue could not be by himself a good petitioning creditor. Looking at the judgment of Fry L.J., I observe that he begins by saying that in that case the receiver could not have maintained an action either at law or in equity, and later on he deals with exceptional cases in which a receiver could maintain such an action. One of the cases which he gives is where the receiver is the holder of a bill of exchange, and the other is where he is in possession of chattels, and the chattels are wrongfully detained from him. In these circumstances it seems to me that we ought not to hold the case of *In re Sacker* (1) to be an authority for the proposition that a receiver cannot be a good petitioning creditor even though the state of things is such that he could maintain an action at law. It is plain that Fry L.J. thought that he could; and Lopes L.J. seems to have taken the same view —that is, the view that if the receiver were the holder of a bill of exchange he could be a good petitioning creditor. In the present case the receiver happens to be the assignee of a judgment, and I think that being the assignee of a judgment he can be a good petitioning creditor even though when the money is recovered it is recovered for the purpose of enabling the Court of Chancery to deal with it. For these reasons I think the appeal must be dismissed.

ROMER L.J. I agree.

COZENS-HARDY L.J. I agree.

Appeal dismissed.

Solicitors: *J. K. Torkington; Willis & Willis.*

(1) 22 Q. B. D. 179.

H. B. H.

C. A.
1904
July 29.

[IN THE COURT OF APPEAL.]

In re PONSFORD.
Ex parte PONSFORD.

Bankruptcy — Adjudication of Bankruptcy — Practice —Notice to Debtor — Adjudication under the Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 20, *sub-s.* 1—*Bankruptcy Rules*, *rr.* 27, 28, 190–192A.

When a receiving order has been made against a debtor and the creditors have resolved that he be adjudged bankrupt, the Court, under s. 20, sub-s. 1, of the Bankruptcy Act, 1883, has jurisdiction on the application of the official receiver to make an adjudication without any previous notice to the debtor of the intention to make the application. But as a general rule it is convenient that notice should be given to the debtor.

APPEAL from a decision of a Divisional Court (Bigham and Darling JJ.), the question being whether an adjudication of bankruptcy had been properly made against a debtor without previous notice to him.

A bankruptcy petition was presented against the debtor in the county court at Newport, Monmouthshire. The petition came on for hearing on September 14, 1903. The debtor was not present in consequence of illness, but a receiving order was made by the registrar. The debtor did not appeal from this order. On November 4, 1903, he submitted a scheme of arrangement with his creditors. On November 12 the official receiver reported that the terms of the proposed scheme were reasonable, if the estimate of liabilities expected to rank for dividend was not exceeded. On November 24 the first meeting of the creditors was held, and was adjourned to December 15 for the purpose of considering the debtor's proposal. On December 15 the adjourned meeting was held, when the creditors passed a resolution in favour of an adjudication of bankruptcy. On the same day the official receiver applied for an adjudication of bankruptcy, which was made. No notice had been given to the debtor of the intention of the official receiver to apply for the adjudication.

C. A.
1904

PONSFORD, *In re.* PONSFORD, *Ex parte.*

On January 5, 1904, the debtor gave notice of appeal from the receiving order. On March 23 this appeal was heard, and was dismissed on the ground that proper notice had not been served upon the trustee in the bankruptcy. The debtor on the same day gave notice of an application to rescind the receiving order and annul the adjudication. This application was heard by the registrar on April 14 and was dismissed.

The debtor appealed to the Divisional Court.

The appeal was heard on June 13, and was dismissed, mainly on the ground of delay in making the application.

On June 18 leave to appeal was given by the Court of Appeal, and notice of appeal was accordingly given by the debtor.

Muir Mackenzie, and *S. G. Lushington*, for the debtor. The adjudication was made under s. 20 (1) of the Bankruptcy

(1) By s. 20, sub-s. 1, "Where a receiving order is made against a debtor, then, if the creditors at the first meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt, or pass no resolution, or if the creditors do not meet, or if a composition or scheme is not accepted or approved in pursuance of this Act within fourteen days after the conclusion of the examination of the debtor or such further time as the Court may allow, the Court shall adjudge the debtor bankrupt; and thereupon the property of the bankrupt shall become divisible among his creditors and shall vest in a trustee."

By the Bankruptcy Rules, 1886 to 1890, r. 190, "At the time of making a receiving order, or at any time thereafter, the Court may, on the application of the debtor himself, adjudge him bankrupt. Such application may be made orally and without notice."

Rule 191: "When a receiving order has been made and a quorum of creditors do not attend at the time and place appointed for the first meeting, or one adjournment thereof, or where the official receiver satisfies the Court that the debtor has absconded, or that the debtor does not intend to propose a composition or scheme, or in any of the other cases mentioned in the Act, the Court may, either on the application of a creditor, or of the official receiver, forthwith adjudge the debtor bankrupt."

Rule 192: "Where a composition or scheme is not accepted by the creditors at the first meeting or at one adjournment thereof, the Court may, on the application of the official receiver, or of any person interested, adjudge the debtor bankrupt."

Rule 192A: "Where the public examination of a debtor is adjourned sine die, and the debtor has not previously been adjudged bankrupt, the Court may forthwith, and without any notice to the debtor, adjudge him bankrupt."

C. A. 1904

PONSFORD, *In re.* PONSFORD, *Ex parte.*

Act, 1883. It is submitted that an adjudication under that section ought not to be made without previous notice to the debtor of the intention of the official receiver to apply for it. An adjudication of bankruptcy not only deprives the debtor of his property, but alters his status and incapacitates him from sitting in Parliament and from holding various offices. It is contrary to the first principles of justice that these disabilities should be inflicted upon a man without his having an opportunity of defending himself: *Dr. Bentley's Case.* (1) It is submitted that the words in s. 20, "shall adjudge the debtor bankrupt," do not mean forthwith, but the Court has a discretion in the matter: *In re Lord Thurlow.* (2) And when it is intended that an adjudication shall be made without notice to the debtor the rules expressly so provide: vide the Bankruptcy Rules, 1886 to 1890, rr. 190–192A. It is submitted that, when there is no such express provision, notice ought to be given in accordance with rule 28. (3) And Form No. 49 in the Appendix of Forms is a notice to debtor of intended application on behalf of the official receiver for adjudication.

[ROMER L.J. It cannot, I think, be said that the Court has no jurisdiction under s. 20 to make an adjudication without notice to the debtor. Suppose the debtor had absconded? It may be it is usual to give notice. But cannot the Court, if it thinks fit, adjudicate without notice in a proper case?]

Cause should be shewn why notice should not be given.

[ROMER L.J. The circumstances may shew that notice need not be given.

Herbert Reed, K.C., for the trustee. The Divisional Court did not say that notice was unnecessary. But they held that

(1) (1722) 1 Str. 557; 8 Mod. 148.

(2) [1895] 1 Q. B. 724.

(3) Rule 27: "Every application to the Court (unless otherwise provided by these rules, or the Court shall in any particular case otherwise direct) shall be made by motion supported by affidavit." By rule 28, "Where any party, other than the applicant, is affected by the motion, no order shall be made, unless upon the consent of such party, or upon proof that notice of the intended motion and a copy of the affidavits in support thereof have been duly served upon such party"; but power is given to the Court under special circumstances to make an order ex parte.

under the circumstances the irregularity, if any, was cured by s. 143 and rule 350 : *In re Pinfold.* (1)

VAUGHAN WILLIAMS L.J. Upon an application under s. 5 of the Debtors Act, 1869, to commit a judgment debtor, the Court has power under s. 103, sub-s. 5, of the Bankruptcy Act, 1883, with the consent of the judgment creditor, to make a receiving order against the debtor instead of committing him. Is it necessary in such a case to give notice to the debtor of the intention to apply for a receiving order?]

In that case the debtor would have notice of the application to commit him, and would know of the alternative.

The practice in the High Court has been to give notice to a debtor of an application for adjudication under s. 20, and Cave J., when he was judge in bankruptcy, gave a direction to that effect. (2)

[VAUGHAN WILLIAMS L.J. Why did the debtor wait till March 23 before applying to annul the adjudication which was made on December 15?

ROMER L.J. He waited more than three months. The trustee has no doubt dealt with his property in the meantime.]

If the bankruptcy is annulled, all dispositions of property under the adjudication and all acts of the official receiver or trustee would be valid under s. 35, sub-s. 2.

Herbert Reed, K.C., and *Corner*, for the trustee, were not called upon.

VAUGHAN WILLIAMS L.J. After the delay which has taken place the application is hopeless, and the appeal must be dismissed. But as regards the practice under s. 20 of the Bankruptcy Act, 1883, whether notice should or should not be given to the debtor of the intention to apply for an adjudication of bankruptcy against him, I wish to say I have no doubt that under that section the Court has jurisdiction in a proper case to make an adjudication without any notice to the debtor. But, although I feel no doubt as to the jurisdiction, I have equally no doubt that the practice, which has been adopted in the High Court since 1885 under the direction given by Cave J.,

(1) [1892] 1 Q. B. 73. (2) Vide note at the foot of this report.

C. A. 1904

PONSFORD, *In re.* PONSFORD, *Ex parte.*

Vaughan Williams L.J.

of giving notice to the debtor in such cases is the most convenient practice to adopt. I agree with what Mr. Lushington said as to the effect of an adjudication of bankruptcy in altering the status of the debtor. Therefore, although I think the Court has jurisdiction under s. 20 to make an adjudication without notice to the debtor, I think it is the most convenient practice that as a general rule notice should be given. I doubt whether the direction given by Cave J. governs the practice of the county courts. But I think that, generally speaking, unless there is some reason to the contrary, the most convenient practice is that which has been adopted in the High Court, and no doubt it will in future be adopted in the county courts. The Divisional Court decided the present case simply on the ground that the delay of three months was fatal to the bankrupt's application, and I agree in that view.

ROMER L.J. and COZENS-HARDY L.J. concurred.

Appeal dismissed.

Solicitors: *R. Carter*; *Taylor, Willcocks & Co., for Gardner & Herbert, Newport, Monmouthshire.*

W. L. C.

NOTE.—By the courtesy of Mr. Registrar Linklater, the reporter has been furnished with a copy of the following reference made on February 25, 1885, by Mr. Registrar Hazlitt, the then senior registrar of the London Bankruptcy Court, on behalf of the registrars of that Court, to Mr. Justice Cave, the then judge in bankruptcy: "Application has been made by Mr. Aldridge, on behalf of the official receiver, to dispense with any notice to a debtor on an application to adjudicate him bankrupt under s. 20 of the Bankruptcy Act, 1883. Hitherto the registrars have required notice to be given to the debtor, unless in the case where he has absconded or otherwise absented himself. Mr. Aldridge contends that upon the report of the official receiver, alleging any of the grounds in s. 20, the Court, having regard to the difference of the words 'shall adjudge' in s. 20, and 'may adjudge' in s. 16, is bound to adjudicate the debtor bankrupt. The registrars think that the debtor ought to have an opportunity of objecting to an adjudication of bankruptcy. He might contend that the resolution of the creditors 'that he be adjudged bankrupt' had not been duly passed, inasmuch as certain creditors' proofs had been admitted against the admission of which he desired to appeal, or if a composition had not been accepted he might (as has been the case) intend to apply for a new meeting to be held in consequence of some informality or irregularity. To give as little trouble as possible in the office of the solicitor to the official receiver, the registrars

think that two days' notice given by registered letter to the debtor of any application might be sufficient (see s. 142 and rule 92), and that such notice might be given for any day the official receiver might appoint, and would be heard at 11 o'clock by the registrar in chambers without the necessity of procuring an appointment from the registrar's clerk or other formality. The debtor might frequently be served after the first meeting is over with the notice, and a memorandum signed by the clerk who served or posted the notice might be sufficient instead of a formal affidavit of service. Mr. Aldridge, however, desires if possible to be released from giving any notice whatever to the debtor. Under these circumstances the registrars have referred the matter to the judge for his directions after hearing Mr. Aldridge on this reference."

At the foot of this reference the learned judge wrote the following direction:—

"In this case I agree with the registrars in the view they have taken." (Signed) "L. C."

FITCH *v.* BERMONDSEY GUARDIANS.

1904
July 13.

Lunacy—Asylum—Pauper Lunatics settled in Parish outside Asylum Area—Expenses of Maintenance—Limit of Charge—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 283, *sub-s.* 3.

The visiting committee of a lunatic asylum are not entitled under s. 283 of the Lunacy Act, 1890, to fix a greater sum than 14*s.* to be charged for the expenses of the lodging and maintenance of pauper lunatics in the asylum, even in the case of pauper lunatics other than those sent from or settled in a parish or place within the county or borough to which the asylum belongs.

APPEAL from the City of London Court.

The action was brought by the visiting committee of the City of London Lunatic Asylum, in the name of their clerk, to recover from the guardians of the poor of the parish of Bermondsey the sum of 11*l.* 15*s.* for the lodging and maintenance in the asylum from December 30, 1903, to March 30, 1904, of one Andrew John Aiton, a pauper lunatic whose legal settlement was in Bermondsey in the county of London.

Previously to February, 1904, the visiting committee had by resolution under s. 283, sub-s. 1, of the Lunacy Act, 1890 (1),

(1) By the Lunacy Act, 1890, s. 283, sub-s. 1, "Every visiting committee shall fix a weekly sum, not exceeding fourteen shillings, for the expenses of maintenance and other expenses of each pauper lunatic in the

1904

FITCH v. BERMONDSEY GUARDIANS.

fixed the weekly charge for the maintenance and other expenses in the asylum of pauper lunatics chargeable to the union of the City of London at 12*s.* 3*d.* By a resolution of February 4, 1904, under sub-s. 3 of the said section, the committee raised the weekly charge for the maintenance and expenses in the asylum of pauper lunatics chargeable to unions outside the City to 21*s.*, and notice of that resolution was thereupon communicated to the defendants. The sum of 11*l.* 15*s.* sued for represented forty-five days' lodging and maintenance at 2*s.* per day from January 1 to February 15, and forty-five days at 3*s.* per day from February 15 to March 30. The defendants paid 9*l.* into court, being 2*s.* per day for the whole period; and the action proceeded for the balance. The county court judge gave judgment for the defendants.

The plaintiffs appealed.

Danckwerts, K.C., and *Neilson*, for the plaintiffs. The words in sub-s. 3, "a greater weekly sum not exceeding fourteen shillings," mean an additional weekly sum not exceeding that amount. The 14*s.* there referred to is the limit of the excess allowable in respect of out-union patients over and above that allowable for in-union patients, and not the limit of the total sum chargeable for out-union patients. The limit of the total sum is 28*s.* Sub-s. 1 provides that the committee may fix a sum not exceeding 14*s.* for both classes of lunatics. Then in sub-s. 3 the word "greater" can only mean greater than 14*s.*, for no other figure has been mentioned.

R. Cunningham Glen, for the defendants, was not called on.

LORD ALVERSTONE C.J. In my opinion the appellants' contention cannot be supported. It would not be in accordance with the proper construction of the language to read the word "greater" in sub-s. 3 as meaning "additional." Sub-s. 1 gives

asylum and such weekly sum may from time to time be altered."

Sub-s. 3: "A committee may fix a greater weekly sum not exceeding fourteen shillings, to be charged in respect of pauper lunatics other than those sent from or settled in a parish or place within the county or borough to which the asylum belongs."

1904

FITCH v. BERMONDSEY GUARDIANS.

Lord Alverstone C.J.

the committee power to "fix a weekly sum," and sub-s. 3 enables them to "fix a greater weekly sum" in the case of out lunatics—that is to say, greater than the sum already fixed under sub-s. 1; but that greater sum is not to exceed 14*s*. It was intended to meet a case in which the committee did not charge up to their maximum for the home lunatics, and to enable them to charge in that case a higher sum for the out lunatics. Without express statutory authority they would not be able to make a differential charge in respect of the two classes of lunatics. Under the corresponding section of the earlier Act dealing with pauper lunatics (16 & 17 Vict. c. 97, s. 54) it is quite clear that the greater weekly sum to be charged for out lunatics, and which was not to exceed 14*s*., was the total sum, and not an additional sum. And I see nothing in the present Act which indicates any intention to alter the law in that respect.

KENNEDY J. I am of the same opinion. Sub-s. 3 was necessary to enable the committee to differentiate between out lunatics and home lunatics, and to charge up to 14*s*. for the former at a time when they were charging less for the latter.

PHILLIMORE J. I am of the same opinion. The scheme of the section is this: it is assumed that pauper lunatics can as a rule be maintained for something under 14*s*. a week, and it is provided that, if the committee by economy and good management, or because provisions or servants are cheaper in their neighbourhood, can maintain the lunatics for, say, 12*s*. a week, they may charge up to 14*s*. for out lunatics, but that if for any reason they cannot keep their expenditure under 14*s*. they cannot make a greater charge for the one class of lunatics than for the other.

Appeal dismissed.

Solicitor for appellants: *The City Solicitor.*
Solicitors for respondents: *Arkcoll, Cockell & Chadwick.*

J. F. C.

C. A.

1904

June 21, 23, 27, 28, 29; *July* 29.

[IN THE COURT OF APPEAL.]

RUBEN AND ANOTHER *v.* GREAT FINGALL CONSOLIDATED AND OTHERS.

Company—Share Certificate fraudulently issued by Secretary—Forgery—Master and Servant—Scope of Employment—Estoppel.

The plaintiffs advanced in good faith a sum of money to the secretary of the defendant company for his own purposes on the security of a share certificate of the company issued to them by the secretary, certifying that certain nominees of the plaintiffs were registered in the company's register of shareholders as transferees of shares. This certificate was, in point of form, in accordance with the company's articles of association, inasmuch as it bore the seal of the company, and appeared to be signed by two of the directors and countersigned by the secretary. The seal of the company was, however, affixed to it by the secretary fraudulently, and without authority, and the signatures of the two directors were forged by him. In an action against the defendant company for damages for refusing to register the plaintiffs' nominees as owners of the shares:—

Held, that, in the absence of any evidence that the defendant company had ever held out the secretary as having authority in this behalf to do anything more than the mere ministerial act of delivering share certificates, when duly made, to the owners of shares, the defendant company were not estopped by the forged certificate from disputing the claim of the plaintiffs, or responsible to them for the wrongful action of their secretary as aforesaid.

Shaw v. *Port Philip Gold Mining Co.*, (1884) 13 Q. B. D. 103, discussed and explained.

APPEAL against the judgment of Kennedy J. (1) in an action tried before him, in which the jury had been discharged.

The action was to recover damages from the defendant company for their refusal to place the names of Max Rosenhain and Edmond Alexandre on their register of shareholders.

The following statement of the material facts is in substance taken from the judgment of the learned judge in the Court below.

One A. S. Rowe, then a partner in Bewick, Moreing & Co., was in December, 1902, the secretary of the defendant company. He held the appointment under a written agreement of

(1) [1904] 1 K. B. 650.

December 31, 1900, between the defendant company and Bewick, Moreing & Co., whereby Bewick, Moreing & Co. undertook to provide the defendant company with suitable offices and office accommodation, a suitable secretary, to be approved of by the company, and a sufficient clerical staff. The secretary was to be paid by Bewick, Moreing & Co., but was to be deemed to be the secretary and officer of the defendant company, and subject to dismissal by the defendant company at any time. Bewick, Moreing & Co. were to receive 500*l.* a year from the defendant company, and also all transfer fees received by the defendant company. The defendant company's registered office in December, 1902, was in the offices of Bewick, Moreing & Co., 20, Copthall Avenue, E.C., and several other limited companies were housed and provided for by Bewick, Moreing & Co. there under similar arrangements. The plaintiffs were a firm of stockbrokers in the City, with whom Rowe had for some months before December, 1902, done business on his own private account in stock and share transactions. They knew he was a partner in Bewick, Moreing & Co. They did not know that he was secretary of the defendant company. They believed him to be a director of it. He had been introduced to the plaintiffs as a person in good credit; he kept his engagements, and they had every confidence in him. With Mr. Lindo, one of the partners in the plaintiffs' firm, Rowe was on terms of social acquaintance. In December Rowe saw Mr. Lindo and asked whether the plaintiffs could arrange a loan for him on 5000 shares in the defendant company. He said he had a joint account with a friend, who wished to sell, and he desired to take over the friend's interest and so avoid a sale, because, on information which he had received, he believed the shares (which were then at a premium) would rise considerably in value. He wanted the loan for a short time only, and as the 5000 shares afforded at the price of the day ample security for the 20,000*l.* which he wanted on loan, and as he undertook, if there was any fall in price, to provide a 2*l.* per share margin, the plaintiffs agreed to try to meet his wishes. On December 16 the plaintiffs arranged with Lazard Brothers & Co., who were bankers, and who had been

C. A. 1904

RUBEN v. GREAT FINGALL CONSOLIDATED.

made by the plaintiffs defendants in the action in order that all the parties might be before the Court, for the advance of 20,000*l.* to themselves for a principal on the proposed security; and Mr. Lindo on the same day went to the offices of Bewick, Moreing & Co., which were also the offices of the defendant company, and told Rowe that the money would be ready on December 18. Rowe said that he would have the share transfer executed by the transferor on the following day. The shares, he said, were standing in the company's books in his friend's name and not in his own. On December 17 the transfer, with the names of Max Rosenhain, who was a partner in the firm of Lazard Brothers & Co., and Edmond Alexandre as transferees, but with the space for the name of the transferor left in blank, was taken by Lindo to Rowe, and later in the same day it was returned by Rowe to Lindo, and purported to have been executed by "E. Storey" as transferor. A shareholder of that name was called as a witness, and gave evidence to the effect that he was interested at the time in 5000 shares in the company, but that he was the registered owner only of 2000 shares. The signature of the transferor was forged by Rowe. In the corner of the document was the usual "certification." Rowe, when he gave Lindo the transfer, said that his directors (that is, the directors of the defendant company) would be meeting the next day at 11 A.M., that he would explain everything to them and have the share certificate made out in the names of Rosenhain and Alexandre, and that it would be ready for Lindo if he called at 11.30 A.M. The same afternoon Lindo brought back to Rowe the transfer executed by the transferees, paid to him the registration fee of 2*s.* 6*d.*, and received a receipt in due form. On December 18, at 11.30 A.M., at the office, Rowe delivered to Lindo the share certificate, and Lindo returned the receipt to Rowe. The certificate thus issued was in form perfectly regular. It purported, in accordance with art. 12 of the articles of association of the defendant company, to bear the seal of the defendant company, to be signed by two of its directors, and to be countersigned by Rowe as the defendant company's secretary. Lindo learnt from it for the first time that Rowe was the company's secretary. The certificate was

taken by Lindo to the plaintiffs' office, where it was examined by their clerk, and it was then taken by him to the office of Lazard Brothers & Co., where it was left after its examination by a clerk there, and their cheque for 20,000*l.* in favour of the plaintiffs was handed to Lindo. This cheque was paid by the plaintiffs into their own banking account, and a cheque of the plaintiffs for the same amount, less stamp fee and commission, was handed over to Rowe the same day, and was subsequently cashed by him. Within ten days Rowe absconded, and it was discovered that the certificate was a forgery. The only genuine part of it was Rowe's counter-signature as secretary. The signatures of the two directors, which it bore, were forged, and the seal of the company, which it also bore, had been fraudulently affixed to it by Rowe, who, as secretary, had access to it at all times, and, as the learned judge thought, practically the custody of it, in the safe of the defendant company. By art. 12 of the articles of association of the defendant company it was provided that "the certificates of title to shares shall be issued under the seal of the company, and signed by two directors and countersigned by the secretary, or some other person appointed by the directors."

Messrs. Lazard Brothers & Co., by their solicitors, applied to the defendant company for the registration of Rosenhain and Alexandre in the books of the defendant company as the owners of the shares. The defendant company refused to accede to the application. Then Lazard Brothers & Co. applied to the plaintiffs for other equivalent security or repayment of the loan of 20,000*l.* The plaintiffs paid Lazard Brothers & Co. the amount of the loan, with interest, and thereupon, as the defendant company refused to register the ownership of Rosenhain and Alexandre or recognise their title to the shares, they brought the present action, after obtaining from Lazard Brothers & Co. an assignment of the firm's rights, if any, and giving written notice of such assignment to the defendant company. In this action the plaintiffs claimed against the defendant company. Lazard Brothers & Co. and Rosenhain and Alexandre were defendants only in form.

At the trial certain statements or admissions of material

C. A. 1904

RUBEN v. GREAT FINGALL CONSOLIDATED.

facts were agreed to by the counsel for the respective parties, and the jury were thereupon discharged. These statements or admissions of fact were, so far as material to the present report, as follows: Agreed (1.) that the alleged certificate was not a valid or genuine document, and that the signatures thereon, other than the signature of Rowe, were forgeries; (2.) that (*a*) the bank (Lazard Brothers & Co.) and the plaintiffs respectively made the advances upon the faith of the genuineness and validity of the alleged certificate and of its being properly issued, and (*b*) the secretary was a proper person to deliver it; (3.) that Rowe, in creating and delivering to Lindo the alleged certificate, acted fraudulently and not for or on behalf of or for the benefit of the defendant company, and solely for himself and for his own private purposes and advantage; (4.) that the defendant company did not by its directors or otherwise authorize Rowe to make, seal, or issue the alleged document.

Kennedy J. held, upon the authority of *Shaw* v. *Port Philip Gold Mining Co.* (1), that the company were estopped by the certificate issued by their secretary from disputing the plaintiffs' right to have the transferees registered as owners of the shares. He accordingly gave judgment for the plaintiffs.

June 21, 23, 27, 28, 29. *Lawson Walton*, *K.C.*, and *J. Eldon Bankes*, *K.C.* (*Bremner* with them), for the defendants. As regards any question of title to the shares mentioned in it, the certificate was a mere nullity, the seal having been affixed fraudulently without the authority of the company, and the signatures of the directors being forgeries. The secretary was not authorized to affix the seal to the certificate, or to issue it on behalf of the defendants. He did so fraudulently, not in the defendants' interests but in his own interests, and on his own account. He, therefore, cannot be considered as having acted within the scope of his employment in delivering the certificate to Lindo; and, if that delivery is to be taken as involving any representation by him as to the validity of the certificate, that representation does not work any estoppel

(1) 13 Q. B. D. 103.

against the company. Nor was there anything to make the company liable by way of estoppel through negligence of which the plaintiffs' loss can be considered the consequence in point of law. There was really no evidence of negligence; and, if there were, the authorities shew that it could not be considered the effective cause of the plaintiffs' loss. It is not the natural consequence of entrusting an official with the company's seal that he should use it to commit forgery: *Bank of Ireland* v. *Trustees of Evans' Charities* (1); *Merchants of the Staple of England* v. *Bank of England.* (2) *Shaw* v. *Port Philip Gold Mining Co.* (3), by which case the learned judge in the Court below thought himself bound, is really distinguishable. In that case apparently the secretary had been held out as authorized to procure and issue share certificates; at any rate the judgment proceeded on the footing that that was so, and that the plaintiff acted on the faith of that holding out. There was really no evidence in the present case of any holding out of Rowe as having such authority, or that the plaintiffs acted on the faith of Rowe's being secretary of the company. The evidence was that Lindo, who acted for the plaintiffs, did not know that Rowe was the secretary of the company until the transaction had been completed; and the only authority given to the secretary is to perform the mere ministerial act of handing the certificate to the person applying for it. Moreover, the case of *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (4), which was subsequently decided by the Court of Appeal, really overrules *Shaw* v. *Port Philip Gold Mining Co.* (3) It was there held that, where the secretary of a company was authorized in the course of business to answer inquiries relating to the validity of an issue of shares on behalf of the company, and he made certain untrue statements on the subject, not in the interests of the company, but on his own account and in his own interests, he could not be considered to have made those statements within the scope of his authority; and therefore the case did not fall within the principle on which it was held in *Barwick* v. *English Joint Stock*

(1) (1855) 5 H. L. C. 389.
(2) (1887) 21 Q. B. D. 160.
(3) 13 Q. B. D. 103.
(4) (1887) 18 Q. B. D. 714.

C. A. 1904

RUBEN v. GREAT FINGALL CONSOLIDATED.

Bank (1) that a company might be liable for the fraudulent representation of its servant. In *Barnett* v. *South London Tramways Co.* (2) Lord Esher M.R. said that a secretary of a company was a mere servant, whose position was that he was to do what he was told, and that no person was entitled to assume that he had any authority to represent anything at all. There is no case, except *Shaw* v. *Port Philip Gold Mining Co.* (3), in which a company has been held liable in respect of a forged certificate like that in the present case. In the case of *In re Bahia and San Francisco Ry. Co.* (4) a genuine certificate was issued on the faith of a forged transfer, and it was held that the company must take the risk in such a case, and were bound by the certificate which they had issued. That case obviously depends on wholly different considerations from those which apply to the present case. The same considerations apply to such cases as *In re Ottos Kopje Diamond Mines* (5) and *Balkis Consolidated Co.* v. *Tomkinson.* (6)

[They also cited *Jorden* v. *Money* (7); *George Whitechurch, Ld.* v. *Cavanagh* (8); *Limpus* v. *General Omnibus Co.* (9); *McGowan* v. *Dyer* (10); *Thorne* v. *Heard* (11); *Mahony* v. *East Holyford Mining Co.* (12)]

Rufus Isaacs, K.C., and *J. D. Crawford*, for the plaintiffs. It is admitted that Rowe as secretary of the defendant company was the proper person to issue or deliver share certificates, when applied for at the office of the company. In this case the office of the company was at the office of the firm of Bewick, Moreing & Co., in which Rowe was a partner. It is true that the dealings between Lindo, as representing the plaintiffs, and Rowe, up to the time when Lindo applied for and received the share certificate, may have been dealings as between brokers and client, and Lindo may not have known that Rowe was the secretary of the company; but, when Lindo

(1) (1867) L. R. 2 Ex. 259.
(2) (1887) 18 Q. B. D. 815.
(3) 13 Q. B. D. 103.
(4) (1868) L. R. 3 Q. B. 584.
(5) [1893] 1 Ch. 618.
(6) [1893] A. C. 396.
(7) (1854) 5 H. L. C. 185.
(8) [1902] A. C. 117.
(9) (1862) 1 H. & C. 526.
(10) (1873) L. R. 8 Q. B. 141.
(11) [1894] 1 Ch. 599; [1895] A. C. 495.
(12) (1875) L. R. 7 H. L. 869.

applied for, and obtained from Rowe the certificate, upon the face of which it appeared that Rowe was the secretary of the company, it must be taken that Lindo was applying for the certificate at the offices of the company, and that he received it from Rowe as the company's secretary. The handing out of the certificate by the secretary of the company imports a representation or warranty that the certificate so handed out is a genuine certificate, and on the faith of such a representation the plaintiffs advanced money to Rowe. The secretary of the company being an official authorized by the company, and held out by them as authorized, to do a certain class of acts on behalf of the company, namely, to issue or deliver such certificates to persons applying for them at the office of the company in the course of business, the representation necessarily involved in so doing is a representation made by him for the benefit of and on behalf of the company within the meaning of the doctrine of *Barwick* v. *English Joint Stock Bank.* (1) It is immaterial that in the particular instance his motives were dishonest, and that he acted fraudulently in his own interests, and not in the interests of the company: *Hambro* v. *Burnand.* (2) The act of issuing the certificate being one of a class of acts which he was authorized by the company to do on their behalf and for their benefit, the representation so made by him must be regarded as being within the scope of his authority, and the company are estopped from denying the truth of it. This was held to be so in *Shaw* v. *Port Philip Gold Mining Co.* (3), a case the facts of which are really identical with those of the present case. That decision has now stood for twenty years, and there has never been any authority or dictum to the contrary. There is no inconsistency in point of principle between the decision in *Shaw* v. *Port Philip Gold Mining Co.* (3) and that in *George Whitechurch, Ld.* v. *Cavanagh* (4), on which the defendants rely. Both decisions are really applications of the principles laid down in *Barwick* v. *English Joint Stock Bank.* (1) The decision in *George Whitechurch, Ld.* v. *Cavanagh* (4) related to "certifications,"

(1) L. R. 2 Ex. 259.
(2) Ante, p. 10.
(3) 13 Q. B. D. 103.
(4) [1902] A. C. 117.

C. A. 1904

RUBEN v. GREAT FINGALL CONSOLIDATED.

not to share certificates, and the reason why the House of Lords decided as they did was that they came to the conclusion in point of fact that, in giving authority to the secretary to certify transfers of shares, the company did not authorize him to do more than give a receipt for certificates of shares actually lodged in the office, and those who chose to rely on that receipt did it at their own risk, if the certificates were not so lodged. But it does not follow that the same reasoning applies to share certificates under the seal of the company, which are made by the 31st section of the Companies Act, 1862 (25 & 26 Vict. c. 89), primâ facie evidence of the title to the shares or stock therein specified. In *George Whitechurch, Ld.* v. *Cavanagh* (1) Lord Macnaghten and Lord James of Hereford were careful to distinguish most pointedly between share certificates and certifications for this purpose. Certification is merely the ministerial act of the secretary, and does not purport to be an act of the board of directors. A share certificate under the seal of the company, and purporting to have been executed with all the formalities required by the articles of association, is practically the ultimate security to which persons advancing money on the faith of it can alone look. It is impossible for a person to whom such a certificate is delivered to ascertain whether the signatures of the directors are genuine, or whether the seal has been properly affixed. All he can do is to obtain from the proper officer of the company at the company's place of business a certificate under the seal of the company appearing on the face of it to be regular and to have been executed in conformity with the requirements of the articles of association. The secretary is entrusted by the company with their seal, and he is authorized by them to issue or deliver share certificates. It is clear that, if he negligently issued a share certificate which was incorrect to a person who acted on the faith of it, the company would be liable; why should the result be different, where he fraudulently issues such a certificate? Unless the company is bound by the representation impliedly made by him in issuing such a certificate that it is genuine, all security in dealing with shares or stock of

(1) [1902] A. C. 117, at pp. 126, 134.

companies on the market would be gone. It is really for the benefit of the shareholders of a company as well as transferees of shares that there should be the necessary machinery by which transfers may be facilitated and persons dealing with shares may be safeguarded; and consequently the issue of certificates by the secretary is a class of act done "for the benefit" of the company in the sense in which these words are used in this connection: see per Cockburn C.J. and Blackburn J. in *In re Bahia and San Francisco Ry. Co.* (1), and per Lord Cairns L.C. in *Burkinshaw* v. *Nicolls.* (2) The decision in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (3) does not really overrule *Shaw* v. *Port Philip Gold Mining Co.* (4), because that case was decided, rightly or wrongly, on the assumption that the representations made by the secretary were not made by him for the benefit of the company, or in the course of his duty to them at all, whereas the issue of share certificates was, it is submitted, clearly within the scope of the secretary's duty in this case. In *Balkis Consolidated Co.* v. *Tomkinson* (5) Lord Herschell disposes of the argument employed by Bowen L.J. in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (3), namely, that the company could not be estopped by their secretary's representation from denying that they had done an act which, if done, would have been ultra vires, by pointing out that the law does not forbid a company from employing its funds in paying damages for a wrong done, and, though it might be ultra vires for a company to place a person on the register of shares in respect of shares which they were not authorized to issue, it would not be ultra vires for them to pay damages to him for not doing so, where they were estopped from denying his title to shares.

The cases of *Bank of Ireland* v. *Trustees of Evans' Charities* (6) and *Merchants of the Staple of England* v. *Bank of England* (7) have really no bearing on the present case. In those cases a person, in whose custody the seal of a body had

(1) L. R. 3 Q. B. 584.
(2) (1878) 3 App. Cas. 1004, at p. 1017.
(3) 18 Q. B. D. 714.
(4) 13 Q. B. D. 103.
(5) [1893] A. C. 396, at p. 407.
(6) 5 H. L. C. 389.
(7) 21 Q. B. D. 160.

C. A. 1904

RUBEN v. GREAT FINGALL CONSOLIDATED.

been placed, fraudulently used it for the purpose of forging documents; and it was held that, assuming that there had been negligence on the part of the body in question, the damage was too remote, that negligence not being the proximate cause of the loss. It is clear that in those cases the act of the forger in affixing the seal and issuing the document was not done within the scope of any authority given to him; and the cases turned entirely on the question whether there was negligence which was the effective cause of the loss.

Shaw v. *Port Philip Gold Mining Co.* (1) has been referred to without disapproval in *Cox* v. *Bruce* (2), *Bishop* v. *Balkis Consolidated Co.* (3), *Merchants of the Staple of England* v. *Bank of England* (4), and *Balkis Consolidated Co.* v. *Tomkinson.* (5)

[They also cited *Grant* v. *Norway* (6); *Coleman* v. *Riches* (7); *Swan* v. *North British Australasian Co.* (8); *Houldsworth* v. *City of Glasgow Bank* (9); *D'Arcy* v. *Tamar, Kit Hill and Callington Ry. Co.* (10); *Swift* v. *Winterbotham* (11); *Swift* v. *Jewsbury* (12); *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* (13); *Dyer* v. *Munday* (14); *Hamlyn* v. *Houston & Co.* (15); *In re County Life Assurance Co.* (16)]

Lawson Walton, K.C., for the defendants, in reply cited *Farquharson Brothers & Co.* v. *King & Co.* (17); *Tendring Hundred Waterworks Co.* v. *Jones* (18); *Dixon* v. *Kennaway & Co.* (19); *Mackay* v. *Commercial Bank of New Brunswick.* (20)

Cur. adv. vult.

July 29. COLLINS M.R. read the following judgment:—The question on this appeal is whether the appellants, a limited

(1) 13 Q. B. D. 103.
(2) (1886) 18 Q. B. D. 147.
(3) (1890) 25 Q. B. D. 512.
(4) 21 Q. B. D. 160.
(5) [1893] A. C. 396.
(6) (1851) 10 C. B. 665.
(7) (1855) 16 C. B. 104.
(8) (1863) 2 H. & C. 175.
(9) (1880) 5 App. Cas. 317.
(10) (1866) L. R. 2 Ex. 158.
(11) (1873) L. R. 8 Q. B. 244.
(12) (1874) L. R. 9 Q. B. 301.
(13) [1895] 1 Ch. 629.
(14) [1895] 1 Q. B. 742.
(15) [1903] 1 K. B. 81.
(16) (1870) L. R. 5 Ch. 288.
(17) [1902] A. C. 325.
(18) [1903] 2 Ch. 615.
(19) [1900] 1 Ch. 833.
(20) (1874) L. R. 5 P. C. 394.

company, are responsible in the circumstances for the fraud and forgery of their secretary, one Rowe, who is now undergoing a sentence of penal servitude.

The respondents are a firm of stockbrokers. Rowe was a member of a well-known firm carrying on business as engineers. He was also secretary of the appellant company, whose business was conducted in the office of his firm. In December, 1902, Rowe, who had frequently done business with the respondents, applied to one of their firm named Lindo to procure a loan of 20,000*l.* on the security of 5000 shares in the appellant company, which he said were the joint property of himself and a friend in whose name they stood, and who wished to sell them, while he, Rowe, was desirous of acquiring them. The operation was to be carried out by a transfer from the friend in whose name they stood to the proposed lender, who on receiving the certificate would make the required advance. The facts and admissions are fully stated in the judgment of Kennedy J., and it is not necessary for my purpose to do more than summarize them as briefly as possible. The respondents arranged with a firm of bankers for the required loan on production of the transfer and certificate duly made out in their names. A transfer was accordingly forged by Rowe in the name of Storey to the bankers, by whom it was executed. It was then brought back by Lindo to Rowe to be exchanged for a certificate, which Rowe told him would be passed by the directors and ready for him early the next day. Lindo paid a registration fee to Rowe of 2*s.* 6*d.*; and, returning the next day at the appointed hour, received the certificate from Rowe, and took it to the bank, who then advanced the money to Lindo who paid it into his firm's bank, and gave Rowe a cheque for the amount, less a deduction for commission. Throughout these transactions, and until he had received the certificate and taken it to his office, Lindo was unaware that Rowe was secretary, though he thought he was a director of the company. Rowe absconded. It was admitted that Rowe had forged the names of the two directors which appeared upon the certificate, and had affixed the company's seal thereto "fraudulently and not for or on behalf of or for the benefit of the defendant

C. A. 1904

RUBEN v. GREAT FINGALL CONSOLIDATED.

Collins M.R.

company, and solely for himself and for his own private purposes and advantage." It was also admitted that Rowe was "a proper person to deliver" the certificate. On discovery of the fraud the company refused to put the bankers on the register. The respondents were therefore obliged to recoup the bank the sum of 20,000*l.*, and claimed in this action to recover it from the appellants on the ground that they were estopped from setting up Rowe's fraud.

Kennedy J., who tried the case without a jury, upon the admissions which he has set out, was of opinion that the case was indistinguishable from *Shaw* v. *Port Philip Gold Mining Co.* (1), and gave judgment for the plaintiffs. The defendants appeal.

The case was very elaborately argued, and the amount at stake is large; but I think the principles on which the decision rests are well established, and, when the facts are properly understood, are easy of application.

The general rule governing the responsibility of a master for the acts of his servant was stated by the late Willes J. in delivering the judgment of the Exchequer Chamber in *Barwick* v. *English Joint Stock Bank.* (2) The passage has been frequently cited and approved, and is indeed the locus classicus on the subject. It runs as follows: "The master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." He then gives instances where this rule has been acted on and proceeds: "In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in." Founding themselves on the principle so stated, the Court of Appeal in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (3) held that an action of deceit would not lie

(1) 13 Q. B. D. 103. (2) L. R. 2 Ex. 259.
(3) 18 Q. B. D. 714.

against a principal for a fraudulent misstatement made by his servant for his own private purposes in reply to a class of question which it was within his ordinary duty to answer. The fact that it was made, not in the supposed interest of the master, but for his own private purposes, ipso facto took it out of the scope of the actual authority, and also, according to Bowen L.J., out of the class of acts which the agent was put there to do. In *Thorne* v. *Heard* (1) Kay L.J. refers to this case, to which he was not himself a party, in these terms: "It was deliberately decided in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (2) that the words 'for the master's benefit' are essential, and that, where an agent in the course of his employment committed a fraud not for his principal's benefit but for the benefit of himself, and the principal did not benefit by such fraud, he could not be made liable for it." It was also cited with approval by Lord Brampton in the House of Lords in the recent case of *George Whitechurch, Ld.* v. *Cavanagh.* (3) It was also sought in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (2) to fix the master with liability on the ground of estoppel by holding out the servant as the proper person to answer such questions. The two judges, however, who dealt with that aspect of the case, disposed of it on another ground, which was subsequently disapproved, namely, that a company could not be estopped from denying that which to admit would involve an ultra vires act: see *Balkis Consolidated Co.* v. *Tomkinson* (4), per Lord Herschell. The case, therefore, is not a direct authority on the question whether the holding out may be of such a character as to debar the master from escaping responsibility for an act done by his servant within his apparent authority, although done not with any notion of benefiting the master, but exclusively for fraudulent purposes of his own. It is obvious that the ostensible authority may be larger than the actual, but the question will still remain whether it can ever be large enough to make the master responsible for a fraud or crime committed exclusively for the servant's own purposes, and not utilized in any way by

(1) [1894] 1 Ch. 599, at p. 611.
(2) 18 Q. B. D. 714.
(3) [1902] A. C. 117, at p. 141.
(4) [1893] A. C. 396, at p. 407.

C. A. 1904

RUBEN v. GREAT FINGALL CONSOLIDATED.

Collins M.R.

the master. A difficulty was raised in argument on this point. It was urged that, where the actual authority is in writing and unambiguous, and covers the actual thing done, the master is bound, though the servant misuses the authority fraudulently for his own purposes: see *Hambro* v. *Burnand* (1), decided in this Court, following the opinions of Lord Brougham L.C. and of the Privy Council, and of a line of cases in America. Ought there then to be any difference where the authority is not in writing, but is nevertheless clearly ascertained by the verdict of a jury or otherwise upon sufficient evidence of holding out? In my opinion it is not necessary to decide this point in this case, since, for the reasons which I will presently state, I do not think the holding out here can possibly be pushed so far as to bring the fabricating the certificate, whether by writing the directors' names or by misusing the seal, within the class of acts which the secretary was apparently authorized to do. It may be, however, that a long step towards the solution of the difficulty will be found in that class of cases where the limits of what has often been called estoppel by negligence have been discussed; for instance, *Bank of Ireland* v. *Trustees of Evans' Charities* (2); *Northern Counties of England Fire Insurance Co.* v. *Whipp* (3); and for a very full discussion of the subject, see Beven on Negligence in Law, 2nd ed. vol. ii. Book VII. ch. 4. It is clear that a man may by his negligence where he owes a duty, provided that negligence be sufficiently closely connected with the event to bring it within the legal chain of causality, make himself responsible to the person or class of person to whom he owes a duty for the crime or fraud of another committed for that other's own purposes. It may be that to put a written authority in the hands of another person without conditions or safeguards is such negligence as to entail responsibility to third parties for fraudulent misuse of the authority: see the instance given by Fry L.J. in *Northern Counties of England Fire Insurance Co.* v. *Whipp* (4) of a mortgagee who allows a mortgagor to have the custody of the title-deeds for the purpose of

(1) Ante, p. 10.
(2) 5 H. L. C. 389, at pp. 409 et seq.
(3) (1884) 26 Ch. D. 482, at p. 494.
(4) 26 Ch. D. 482.

raising a loan. I cannot think that the judges who decided the *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (1) intended to deny the possibility of the principal's liability in cases of this class for the fraud or crime of his agent committed for the agent's own purposes. However this may be, it is I think clear in this case that there is no evidence of such a holding out as to bring the acts done by Rowe within any presumable scope of authority. To put it most favourably for the respondents, the act, whether done for the master's benefit or not, must at least be one of the class of acts which the servant is ostensibly put there to do, so as to bring it within the second limb of Willes J.'s proposition. If we try it by the test of actual authority, the actual scope certainly did not cover any acts other than those of a purely ministerial character, such as bringing the certificate before the directors for signature and appending the seal in their presence; and it does not need the authority of the *Bank of Ireland* v. *Trustees of Evans' Charities* (2) and *Merchants of the Staple* v. *Bank of England* (3) to shew that fraud and forgery were not within the actual scope of such an employment. But so far as regards all this class of prior acts there is no ostensible representation at all. There is no holding out with respect to them. The ostensible action of the secretary is limited to handing over the apparently complete certificate. How does such an act carry with it any implication of authority to make as well as to hand over the instrument? His own signature may import a personal representation by himself that the document is apparently genuine, and found a right against himself; but it does not import that he had any other than ministerial duties in connection with the matter. If this is so, it does not in any way enlarge the presumption if the act of handing over be often repeated; and it seems to me, therefore, that there is nothing in the point so much pressed that this was a mercantile company whose shares were constantly changing hands on the market. I think, therefore, that the representation, such as it was, based on the fact that Rowe had ostensible authority to hand over

(1) 18 Q. B. D. 714. (2) 5 H. L. C. 389.
(3) 21 Q. B. D. 160.

C. A. 1904

RUBEN v. GREAT FINGALL CONSOLIDATED.

Collins M.R.

the certificates, is not more efficacious to fix the company with liability for his fraud than the representation implied in the cases cited from the fact that the clerk or secretary was the proper intermediary through whom the forged powers of attorney were deliverable to the brokers to be handed to the banks. Those cases are therefore in point, and, as it is not contended that there was any such negligence on the part of the company as to fix them with responsibility for Rowe's acts, I think the case against the company fails, and that we are bound to give effect to Kennedy J.'s own view notwithstanding *Shaw* v. *Port Philip Gold Mining Co.* (1) It may be that that case is distinguishable upon its special facts, but it is not necessary to decide the point, for I am clearly of opinion that the facts in this case are not sufficient to found liability in the company. I have treated this case on the footing that Lindo dealt with Rowe as secretary of the company, and acted on the faith of the ostensible authority implied from his position as such, but I am by no means sure that this is the true inference from the evidence.

An argument was founded upon some observations of the Law Lords in *George Whitechurch, Ld.* v. *Cavanagh* (2) that the certificate itself carried with it a representation by the company which would bind them against third parties who acted upon it, even though it was a forgery. But though the words used apart from their context might possibly be open to this construction, I think it is reasonably clear from the train of reasoning in their speeches that nothing of the kind could have been meant, and that the certificate they had in mind was one such as that in *In re Bahia and San Francisco Ry. Co.* (3), which had been in fact executed in due form by the company, but under a misapprehension.

The appeal must be allowed.

STIRLING L.J. read the following judgment:—I entirely agree with the judgment which the Master of the Rolls has delivered, but it is right that I should state shortly the main grounds upon which my judgment proceeds.

(1) 13 Q. B. D. 103. (2) [1902] A. C. 117.
(3) L. R. 3 Q. B. 584.

In this case three questions seem to require consideration. The first is this: Is the defendant company bound by the certificate on which the plaintiffs rely?

The articles of association of the defendant company (of which all persons dealing with the company are deemed to have notice) provide (art. 12) as follows: "The certificates of title to shares shall be issued under the seal of the company and signed by two directors, and countersigned by the secretary or some other person appointed by the directors." The document on which the plaintiffs rely is written on the company's paper, and has the seal of the company affixed, and is countersigned by the secretary; it also purports to bear the signatures of two directors, but these are mere forgeries by the secretary. In the circumstances the certificate (as was indeed admitted by the plaintiffs at the trial) is not a valid or genuine document, and does not in my opinion bind the defendants. It was suggested that, inasmuch as the document appeared on the face of it to satisfy the requirements of the articles of association, the plaintiffs, acting as they did in good faith, were not affected by irregularities in the proceedings of the secretary: *Mahoney* v. *East Holyford Mining Co.* (1) To mere irregularities the principle of that case no doubt applies, but it has never been extended to forgery, a forged instrument being simply null and void. The distinction is drawn by Lord Hatherley in advising the House of Lords in the case itself. (2) He says: "Two cases," namely, *Bank of Ireland* v. *Trustees of Evans' Charities* (3) and *D'Arcy* v. *Tamar, Kit Hill and Callington Ry. Co.* (4), "were cited in the argument in which a fraudulent use was made of the seal of a company by the secretary of the company who had been entrusted with that seal. Those cases, however, can have no bearing upon the present case, for they are simply like cases of forgery. It was just as if signatures, not a seal, had been required, and the secretary had forged the names of the directors. A secretary, having no authority to do so, affixed the seal of the company, and the instrument to which that seal was affixed was as void as if the

(1) L. R. 7 H. L. 869.
(2) L. R. 7 H. L. at p. 899.
(3) 5 H. L. C. 389.
(4) L. R. 2 Ex. 158.

C. A. 1904

RUBEN v. GREAT FINGALL CONSOLIDATED.

Stirling L.J.

question had been one of handwriting and a signature had been forged."

The second question is: Is the defendant company estopped from disputing the validity of the certificate? It was strongly urged before us that, inasmuch as the certificate was good on the face of it, and was delivered to the plaintiffs by the secretary of the company, who was admitted by the defendants to be "a proper person to deliver it," the company was precluded from denying as against the plaintiffs the validity of the document; and the decision in *Shaw* v. *Port Philip Gold Mining Co.* (1) was relied upon in support of this contention. It was held in that case that the secretary had in the circumstances been held out by the company as their agent to warrant the genuineness of the certificate, and it was said that the like conclusion ought to be arrived at here. I think it is possible that a company may so act as to produce the reasonable belief on the part of members of the public dealing with the company that the secretary or other agent of the company has authority to warrant the genuineness of the certificates which he delivers; but the question whether a particular company has so acted must in each case be one of fact to be decided on the circumstances of the case. It may well be that the conclusion arrived at by the Divisional Court in *Shaw* v. *Port Philip Gold Mining Co.* (1) was well founded, but the circumstances appear to me to differ from those of the case with which we have to deal. Here the articles of association prescribe that the intervention of three persons, namely, two directors and the secretary (or some other person appointed by the directors), shall be essential to the validity of a certificate. The framers of the articles well knew that certificates were documents of great importance as regards the preparation of which the company required to be protected; and the provisions of art. 12 were directed, and must, as it seems to me, have been recognised by business men as being directed to the securing such protection to the company. The ministerial act of delivering the certificate when prepared to the person entitled to it must be entrusted to some one; it was in fact entrusted, and properly entrusted, to

(1) 13 Q. B. D. 103.

the secretary. But is it a proper inference of fact that the secretary was thereby held out as an agent to warrant the genuineness of the certificate? I am unable to see that it is. So to hold would, in my opinion, be to deprive the company to a very great extent of the benefit of the precautions carefully provided by art. 12, and really leave the company at the mercy of the secretary or other person entrusted with the delivery of a certificate.

The third question is: Are the plaintiffs entitled to recover damages against the company for a wrongful act of the secretary committed in the course of his employment? It is said that the secretary of the company, while acting in the course of the company's business and for the company's benefit, made a representation, on the faith of which the plaintiffs acted and suffered damage, and that, although the secretary had no express authority to make the misrepresentation, still he had authority to do that class of acts, and that the company must be answerable for the manner in which he did the business which the company had entrusted to him: *Barwick* v. *English Joint Stock Bank*. (1) To this there appear to me to be two answers: First, if I am right in the answer which I have given to the second question, the secretary had no authority to make representations as to the genuineness of certificates; he was merely entrusted with the ministerial duty of delivering certificates to those entitled to them. The making of such representations, therefore, was not included in the class of acts which the company entrusted to him. Secondly, the secretary, in delivering the certificate, was not acting in the interests of the company, but in his own; and the case of *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (2) appears to me to be a direct authority that in these circumstances the company is not liable. It is true that part of the reasoning found in the judgments of Bowen L.J. and Fry L.J. has been disapproved by the House of Lords in *Balkis Consolidated Co.* v. *Tomkinson* (3), but the decision has never been overruled, and in fact was cited as an authority by Lord Brampton in the recent case of *George*

(1) L. R. 2 Ex. 259, at pp. 265, 266. (2) 18 Q. B. D. 714.
(3) [1893] A. C. 396, at p. 407.

C. A. 1904

RUBEN v. GREAT FINGALL CONSOLIDATED.

Whitechurch, Ld. v. *Cavanagh.* (1) In my opinion, therefore, it is binding on this Court.

For these reasons I think that the appeal ought to be allowed, and judgment entered for the defendants.

MATHEW L.J. read the following judgment:—This is an appeal from the judgment of Kennedy J. in an action brought to recover damages for the refusal of the defendant company to place the names of the nominees of the plaintiffs upon the register of shareholders.

The plaintiffs rely upon a share certificate received by them from the secretary of the defendant company, which apparently was in proper order and issued in accordance with the company's articles of association. It was contended that the company was estopped from disputing the certificate as against the plaintiffs, who had, on the faith of it, incurred liability to Lazard & Co. for a loan of 20,000*l.*

The defendants contended that they were not bound by a certificate which was a forgery, and which was shewn to have been issued by the secretary to raise money, not for the company, but for his own purposes.

It was not disputed that it was for the benefit of the company that provision should be made for the ready transfer of shares, and that the company followed the usual course in providing for that purpose a transfer department, which was in charge of a principal clerk and a clerical staff. When a transfer was sent to the company, the duty of the transfer clerks was to see that the document was in order, to ascertain that the shares stood in the name of the proposed transferor, and to issue a certification. The matter was then referred to the auditors, whose duty it was to see that the old certificates were cancelled. When this was done, the share certificate was filled up and taken to the secretary's office on the morning of a board meeting to be submitted to the board. The secretary had no duty to supervise what had been done in the transfer department. He was not always present at the board meetings, and it appeared that the certificates were usually brought to the board by one

(1) [1902] A. C. 117, at p. 141.

of the transfer clerks. The directors had the opportunity of making inquiries, and in a case of this magnitude it would be a neglect of their duty if they did not ask for information, or adopt the precaution of comparing the proposed certificate with the share list. When the certificate passed the board the directors signed in accordance with the articles of association. The seal was affixed by the secretary or a director, and countersigned by the former, and the certificate was left with him to be handed to the transferee. This was a ministerial act only, and might be performed by any trustworthy messenger.

It seems clear that the defendant company were bound to take precautions to prevent their being made liable as in the case of *In re Bahia and San Francisco Ry. Co.* (1) for forged or fraudulent transfers, and these regulations as to the conduct of the transfer business would seem to be sufficient for their protection.

It now becomes important to inquire into the transactions between the plaintiffs and Rowe, in order to determine whether the estoppel upon which the plaintiffs relied was established; in other words, whether the company had lost the protection against fraud which their regulations were intended to secure. Rowe was a partner in the firm of Bewick & Co., who were the promoters of this and several other companies. He held the appointment under an agreement of December 31, 1900, whereby Bewick & Co. undertook to provide the defendant company with suitable offices, a suitable secretary, and a sufficient clerical staff. The secretary was to be paid by Bewick & Co., but was to be deemed to be the secretary of the defendant company. The plaintiffs were stockbrokers with whom Rowe had done business on his own account. They did not know that he was secretary to the company. They believed him to be a director. Rowe was in good credit, and the plaintiffs had entire confidence in him. In December Rowe saw Lindo, and asked whether the plaintiffs could arrange a loan for 20,000*l.* for him on 5000 shares in the defendant company. He stated that he had a joint interest with a friend who wished to sell, and he desired to take over the shares because he believed they would

(1) L. R. 3 Q. B. 584.

C. A. 1904

RUBEN v. GREAT FINGALL CONSOLIDATED.

Mathew L.J.

rise considerably in value. He wanted a loan for a short time only, and as the 5000 shares at the then price were ample security for 20,000*l.*, the plaintiffs agreed to try to find the money. The plaintiffs arranged with Lazard & Co., who are bankers, for the advance of 20,000*l.* to themselves on the proposed security, and Lindo on the same day informed Rowe that the money would be ready on December 18. Rowe said that he would at once have the share transfer executed. On December 17 a transfer in blank was taken by Lindo to Rowe, and later in the day was returned by Rowe and purported to have been executed by E. Storey. This document was forged by Rowe. On the transfer appeared the usual certification. Rowe told Lindo that his directors would be meeting the next day, and that he would explain the transaction to them, and would have the share certificate made out ready for Lindo at 11.30 next morning. It is important to notice that Lindo was in this way informed that the transfer must have the sanction of the board. The same afternoon Lindo brought back the transfer executed by the transferees. The next day Rowe delivered to Lindo the share certificate. It was perfectly regular in form, and purported, in accordance with the articles of association, to bear the seal of the company, to be signed by two of the directors, and to be countersigned by Rowe as secretary. Lindo did not notice until he got back to his office that Rowe was the company's secretary. It seems clear that up to this point Lindo dealt with Rowe in his personal and not in his official capacity. As he stated in giving his evidence, he looked upon the loan as Rowe's private business. He supposed him to have authority to transfer the shares, and assumed, when the certificate was handed to him, that Rowe had taken the proper steps to carry the transaction through. The share certificate was handed to Lazard & Co. The money was advanced to the plaintiffs and paid to Rowe. Within a few days Rowe absconded, and it was discovered that the certificate was a forgery. Lazard & Co. applied to the defendant company for the registration of their nominees as the owners of the shares. This application was refused, and the plaintiffs were compelled to pay Lazard & Co. the amount

of the loan with interest. They then brought the present action.

In the argument much reliance was placed by counsel for the plaintiffs on the admission (*b*) that the secretary was a proper person to deliver the certificate. But this guarded concession on the part of the defendant company does not displace and is not inconsistent with the course of business followed by the company.

In these circumstances it seems to me there was no estoppel. There was no evidence that Rowe was held out, or dealt with, as the officer of the company who was empowered to represent to those who dealt in the shares of the company that a transfer was genuine and valid. The company, it seems to me, were no more liable in respect of the forged certificate than they would be upon a verbal statement to the plaintiffs that Storey could transfer the shares. There was no evidence that it was part of the business which Rowe was appointed to transact for the company to make any such representation.

I am of opinion that the action fails, and the loss must rest where it has fallen. The plaintiffs and not the defendant company are the victims of Rowe's dishonesty.

In the view which I take of the facts it is unnecessary to comment upon the cases cited in the course of the argument. With respect to the case of *Shaw* v. *Port Philip Gold Mining Co.* (1), I wish to point out that the judgment proceeded upon the full and detailed description in the special case of "the regular and authorized duty" of the secretary. The statements upon this subject were regarded as amounting to an admission that his fraudulent acts were within the scope of his authority. It was argued for the defendants that, even if this were so, the defendants were not liable because the fraud had been committed by means of a forgery. No distinction between frauds by forgery and frauds by any other means is to be found in the judgment in *Barwick* v. *English Joint Stock Bank.* (2)

It was contended for the defendants that *Shaw* v. *Port Philip Gold Mining Co.* (1) had been overruled by *British Mutual*

(1) 13 Q. B. D. 103. (2) L. R. 2 Ex. 259.

C. A. 1904

RUBEN v. GREAT FINGALL CONSOLIDATED.

Mathew L.J.

Banking Co. v. *Charnwood Forest Ry. Co.* (1) But, with great deference to the eminent judges who decided that case, it seems to me the decision is not available as an authority for the defendants. Their Lordships did not agree as to the grounds for allowing the appeal. It is not easy to reconcile the judgment of Lord Esher M.R. with *Barwick* v. *English Joint Stock Bank* (2), and Bowen L.J. and Fry L.J. base their judgments on the ground that a corporate body cannot be prevented by estoppel from denying that they had done what they had no power to do. But this reasoning was not approved of in *Balkis Consolidated Co.* v. *Tomkinson.* (3) The case of *George Whitechurch, Ld.* v. *Cavanagh* (4) related to an unauthorized certification, and not to a forged certificate.

The appeal must be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Gilbert Samuel & Co.*

Solicitors for defendant company: *Ashurst, Morris, Crisp & Co.*

Solicitors for other nominal defendants: *Lyne & Holman; Bompas, Bischoff & Co.*

(1) 18 Q. B. D. 714.
(2) L. R. 2 Ex. 259.
(3) [1893] A. C. 396.
(4) [1902] A. C. 117.

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1904
July 21.

THE MAYOR, ALDERMEN, AND COUNCILLORS OF THE CITY OF WESTMINSTER *v.* JOHNSON. THE SAME *v.* FULLER.

Revenue—Land Tax—Public Underground Lavatory—Vesting of Subsoil of road in Sanitary Authority—Liability to Land Tax—Land Tax Act, 1797 (38 *Geo.* 3, *c.* 5), *s.* 4—*Public Health* (*London*) *Act*, 1891 (54 *&* 55 *Vict. c.* 76), *ss.* 44, 45.

A sanitary authority who, under the powers conferred by the Public Health (London) Act, 1891, provide and maintain a public lavatory under a road, have, by reason of the vesting in them, by s. 44 of the Act, of the subsoil of the road, such right of ownership in the lavatory as to render them liable to be charged with land tax in respect of it.

Judgment of Wright J., [1904] 1 K. B. 19, reversed by Collins M.R. and Stirling L.J., Mathew L.J. dissenting.

APPEAL from the judgment of Wright J. at the trial of the action without a jury, reported [1904] 1 K. B. 19.

The plaintiffs' claim in Johnson's case was against the defendant as collector of land tax for the Regent Ward No. 1 of the parish of St. James, Westminster, for a declaration that the property known as the underground convenience, and situate at Piccadilly Circus in the city of Westminster, is exempt from land tax; and in Fuller's case the claim was against the defendant as collector of land tax for the Great Marlborough Ward of the same parish for a similar declaration in respect of two underground conveniences situate at Broad Street and Great Marlborough Street respectively. The two actions were tried together.

The facts, which were agreed upon between the parties, were as follows:—

The council of the city of Westminster, in accordance with the provisions of the Public Health (London) Act, 1891, ss. 44 and 45, maintain in the city a number of public lavatories and public sanitary conveniences for the use and benefit of the public. With one exception they are (though this is not admitted by the defendants to be material) each a source of

C. A. 1904

WESTMINSTER CORPORATION v. JOHNSON. THE SAME v. FULLER.

expense to the council, and a burden upon the city rates, and, taking the whole of them together, they are collectively a source of expense to the city and a burden upon the city rates. They are all managed together as one enterprise and by one department of the city administration. Among them are the three which form the subjects of the present actions.

Under the Metropolitan Street Improvements Act, 1877 (40 & 41 Vict. c. ccxxxv.), a block of houses lying between Piccadilly Circus and Tichborne Street was, for the purpose of improving and widening Piccadilly, pulled down, and the site of those houses was thrown into the street. Upon the completion of the improvements the streets and paved portions of land which formed Piccadilly Circus, and also the streets in and about the Circus affected by or made under the Act, were handed over to the vestry of St. James, Westminster. The whole of the streets were, partly under the Act and partly prior thereto, dedicated to the public use.

During the years 1890–1 the vestry, in pursuance of statutory powers conferred by the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), constructed a public convenience in Piccadilly Circus, which convenience was under their powers conferred by that Act and by the Public Health (London) Act, 1891, considerably enlarged and altered by them in the year 1894. (1) This is the convenience which forms the subject of

(1) By the Public Health (London) Act, 1891, s. 44, sub-s. 1, "Every sanitary authority may provide and maintain public lavatories and ashpits and public sanitary conveniences other than privies, in situations where they deem the same to be required, and may supply such lavatories and sanitary conveniences with water, and may defray the expense of providing such lavatories, ashpits, and sanitary conveniences, and of any damage occasioned to any person by the erection or construction thereof, and the expense of keeping the same in good order, as if they were expenses of sewerage."

Sub-s. 2: "For the purpose of such provision the subsoil of any road, exclusive of the footway adjoining any building or the curtilage of a building, shall be vested in the sanitary authority."

Sect. 45, sub-s. 1: "Where a sanitary authority provide and maintain any public lavatories, ashpits, or sanitary conveniences, such authority may—

"(*a*) make regulations with respect to the management thereof, and by-laws as to the decent conduct of persons using the same; and

"(*b*) let the same for any term

the action in Johnson's case. It is constructed partly upon the site of certain of the houses which were pulled down and partly upon a portion of the old street. It consists substantially of an underground opening with brick walls eighteen inches thick, faced with enamel tiles and a floor of mosaic upon concrete, completely protected from the weather by a roof with pavement lights, forming the floor of an island in the roadway substantially of the same area as the convenience. The convenience as enlarged cost about 5090*l.*, and is constructed wholly underground, mainly under the island, but partly under the carriage-way.

The two conveniences which form the subject of the action in Fuller's case, situate in Great Marlborough Street and Broad Street respectively, were constructed by the vestry of St. James, Westminster, under the Public Health (London) Act, 1891. They are similar in construction to the convenience at Piccadilly Circus and are constructed wholly underground, partly under the carriage-way of the street and partly under an island therein, in "made ground" forming part of either the street or the foundation of the street. In the case also of the Piccadilly Circus convenience the space occupied by it is "made ground" consisting of brick and other rubbish placed there in the course of carrying out the improvements authorized by the Act of 1877 and making the streets and island now there, the levels of the land having been considerably altered by the Board's improvement.

The city council place two men and two women in charge of each of the three conveniences at Piccadilly Circus, Marlborough Street, and Broad Street respectively, for the purpose of keeping order and keeping the place clean and taking charge of the lavatories, urinals, and closets. A charge is made for the use of the closets and for the use of the lavatories. The charge is made under s. 45 of the Public Health (London) Act, 1891, for the purpose of aiding in meeting the expenditure on

not exceeding three years at such rent and subject to such conditions as they may think fit; and

"(*c*) charge such fees for the use of any lavatories or water-closets provided by them as they may think proper."

C. A. 1904

WESTMINSTER CORPORATION v. JOHNSON. THE SAME v. FULLER.

public conveniences and lavatories in the city (and is so applied) and with the object of placing some check on a too indiscriminate public user. The charges are not made with a view to profit. The convenience at Piccadilly Circus is open from 7 A.M. to 1 A.M.; that at Great Marlborough Street is open from 7.30 A.M. to 11.30 P.M.; and that at Broad Street is open from 7.30 to midnight for men, and till 11.30 P.M. for women. The convenience at Piccadilly Circus produces an income in excess of the expenses, but it is the only one that does so.

The land tax in respect of one of the houses on the site of which the Piccadilly Circus convenience was constructed had been redeemed prior to the passing of the Metropolis Streets Improvements Act, 1877. The land in respect of the other houses on the site had not been redeemed. From the date when the Metropolitan Board of Works took possession of the houses under the Act no land tax whatever has been paid. The Board paid the Crown the value of the freehold, which was Crown property, but no conveyance has been made by the Crown either to the Board or their successors, the county council, or to any one else.

In the case of both the Great Marlborough Street convenience and that at Broad Street, the land tax in respect of some of the houses opposite to those conveniences has been redeemed, but in respect of others of the houses opposite thereto it has not, and the latter houses are and alway have been assessed to land tax. At the date of the redemption of land tax the sites of the streets surrounding the last-mentioned conveniences were streets substantially as at present.

The Piccadilly Circus convenience was assessed in the valuation list made in pursuance of the Valuation (Metropolis) Act, 1869, and in force at the time of the assessment hereinafter mentioned, at 250*l.* gross, but neither of the other two conveniences have ever been entered or assessed in any such list.

In December, 1900, the corporation of Westminster was assessed to the land tax for the year ending March 25, 1901, in respect of the Piccadilly Circus convenience in the sum of 250*l.*, and in the sum of 80*l.* each in respect of the other two

conveniences. No previous assessment to such tax had ever been made in respect of any of the conveniences. The question which the parties agreed in each action to be the question to be decided between them was whether land tax could be assessed in respect of the conveniences. (1)

Judgment was given for the plaintiffs.

The defendants appealed.

June 19. *Macmorran, K.C.*, and *S. A. T. Rowlatt*, for the defendants. The plaintiffs are liable to land tax as the owners of a tenement or hereditament within the meaning of s. 4 of the Land Tax Act, 1797. Each of these conveniences is a substantial construction, a building below the surface of the street, and lawfully placed in the subsoil of the street under powers conferred by statute. It must have been intended by such a provision as that in sub-s. 2 of s. 44 of the Public Health (London) Act, 1891, which vests the subsoil in the plaintiffs, to vest in them something more than mere control. It is true, as was held in *Tunbridge Wells Corporation* v. *Baird* (2), that the provision of the Public Health Act, 1875, which vests streets in the local authority, does not vest in them the subsoil of the street; but here there is an express statutory enactment vesting the subsoil in the plaintiffs. Further, the mere vesting of a street under the Act of 1875 in the local authority gives them something more than a right of control over, and of dealing with, the surface; it gives some property in the soil of the street for the purpose for which the street is to be used: *Coverdale* v. *Charlton*. (3) As "vesting" therefore has the meaning of "passing the property in," the vesting of the subsoil in the plaintiffs gives them a property in it, so long as the street itself continues to be used as a street; the case

(1) By the Land Tax Act, 1797, s. 4, it is enacted that "All and every manors, messuages, lands, and tenements and all hereditaments of what nature or kind soever they be and all and every person and persons, bodies politic and corporate, guilds, mysteries, fraternities, and brotherhoods, whether corporate or not corporate, having or holding any such manors, messuages, lands, tenements or hereditaments, or other the premises in respect thereof shall be charged" to the land tax.

(2) [1896] A. C. 434.

(3) (1878) 4 Q. B. D. 104, at p. 126.

C. A. 1904

WESTMINSTER CORPORATION v. JOHNSON. THE SAME v. FULLER.

therefore is a far stronger one than *Tunbridge Wells Corporation* v. *Baird*. (1) There is no real distinction between the present case and *Metropolitan Ry. Co.* v. *Fowler* (2), where a railway tunnel which ran under a highway was held to be a hereditament within s. 4 of the Land Tax Act, 1797, and the railway company were held, as owners of an interest in land and not of a mere easement, to be chargeable with land tax. The conveniences are hereditaments or tenements capable of beneficial enjoyment. Under s. 45 of the Act of 1891 the local authority has power to lease them, and such a power is only consistent with their being something in the nature of a tenement. It may be that the interest of the plaintiffs is limited, and that in point of time it will last only so long as the locus in quo is used for its present purposes or the street is used as a street; but as long as the interest lasts it amounts to ownership of the subsoil.

[They also cited *Rolls* v. *St. George the Martyr, Southwark* (3); *London and North Western Ry. Co.* v. *Westminster Corporation* (4); *Attorney-General* v. *Conduit Colliery Co.* (5); *Holywell Union* v. *Halkyn Drainage Co.* (6)]

Danckwerts, K.C., and *Sylvain Mayer*, for the plaintiffs. The judgment of the Court below is right. The corporation have no right of property in the subsoil other than a right to use it for the purposes for which it is vested in them by statute: per James L.J. in *Rolls* v. *St. George the Martyr, Southwark* (7), and that is insufficient to constitute the convenience a tenement or hereditament within the meaning of s. 4 of the Land Tax Act, 1797. The governing case is *Tunbridge Wells Corporation* v. *Baird* (1), in which all the Lords agreed that the purpose for which the street was vested in and given to the local authority was to protect the rights of the public, and that they could not claim a larger property in the soil than was necessary for that purpose. These conveniences are under streets which are not liable to be rated, being in the occupation

(1) [1896] A. C. 434.
(2) [1893] A. C. 416.
(3) (1880) 14 Ch. D. 785.
(4) [1904] 1 Ch. 759.
(5) [1895] 1 Q. B. 301.
(6) [1895] A. C. 117.
(7) 14 Ch. D. 785, at p. 796.

of no one: *Hare* v. *Overseers of Putney* (1); and for the same reason they are not subject to land tax. It is true that the conveniences made under these streets can be let, but so can sewers which are not charged with the tax. In *Metropolitan Ry. Co.* v. *Fowler* (2), the railway company constructed a tunnel for their own profit, made, as pointed out by Lord Esher M.R. and by Lord Herschell in the House of Lords, on land of which they were owners. The position of the corporation in this case is very different. They have the subsoil vested in them by s. 44, sub-s. 2, "for the purpose of such provision"—that is, for the purpose indicated in sub-s. 1—to enable them to supply something dedicated to a public use, and by that sub-section the expenses are to be met as the expenses involved in their further public duty of making sewers are met. It would not have been necessary to give them, if they were owners, power to make by-laws, and to charge fees, and to let the conveniences—that is, to delegate the authority given to them subject as before to the public use to which the conveniences are dedicated. The learned judge was right in holding that the situation so created was different from anything enumerated in the Land Tax Acts, where nothing is mentioned that is dedicated to a public use.

[They referred to *Municipal Council of Sydney* v. *Young* (3) and *Lambeth Overseers* v. *London County Council.* (4)]

S. A. T. Rowlatt, in reply. The consideration of this case should start with the proposition that all land is subject to land tax. It would be assessed first for its surface value, but if it is a road no tax is payable because of the nature of the user. If, however, there is below the surface any user of the land independently of the surface, the hereditament found there is subject to taxation.

Cur. adv. vult.

July 21. COLLINS M.R. read the following judgment:—The question in this appeal is whether the appellants, who are the collectors of land tax in the parish of St. James, Westminster,

(1) (1881) 7 Q. B. D. 223.
(2) [1892] 1 Q. B. 165; [1893] A. C. 416.
(3) [1898] A. C. 457.
(4) [1897] A. C. 625.

C. A. 1904

WESTMINSTER CORPORATION v. JOHNSON. THE SAME v. FULLER.

Collins M.R.

are entitled to demand land tax from the respondents, who are the sanitary authority of Westminster, in respect of certain lavatories and conveniences erected and controlled by them under their statutory powers.

By s. 44, sub-s. 1, of the Public Health (London) Act, 1891, the sanitary authority may provide public conveniences, and by sub-s. 2 the subsoil of any road, exclusive of the footway adjoining any building or the curtilage of a building, shall be vested in the sanitary authority. By s. 45, where the sanitary authority provide and maintain lavatories or conveniences they may make regulations for the management thereof, and may let them for any term not exceeding three years at such rent and subject to such conditions as they may think fit, and charge such fees for the use of any lavatories or water-closets provided by them as they may think proper. In the first of the two cases before us, Johnson's case, the sanitary authority have made such a convenience containing a lavatory, &c., at Piccadilly Circus, and have settled a scale of fees for the use thereof. The convenience is described in the written statement of agreed facts. It is a walled and roofed structure covering a considerable area, and is open to the public from 7 A.M. to 1 A.M., when it is shut up. Male and female attendants are in charge while it is open; the cost of erection was about 5000*l*. The fees received at this convenience produce an income in excess of the expenses. All the other conveniences are worked at a loss. Can the respondents be said to "have or hold land" or a "hereditament or tenement" in the case of this particular convenience within the meaning of the Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 4? Wright J. has held that they cannot, on the ground that "having or holding" in the Land Tax Act, 1797, must primâ facie import "ordinary unqualified rights of property," and are not satisfied by "a restricted and qualified property" which the sanitary authority in his view possessed in this case. No doubt the tendency of modern decisions has been to limit the meaning of the word "vest" in the Public Health Acts in connection with a street to vesting "in the urban authority such property, and such property only, as is necessary for the control, protection, and maintenance of the

street as a highway for public use," as stated by Lord Herschell in the passage cited by Wright J. from *Tunbridge Wells Corporation* v. *Baird*. (1) But no case has gone so far as to hold that actual property, as distinguished from an easement only, was not passed to the authority by that word. *Coverdale* v. *Charlton* (2) decided that it conferred the right to demise the right of pasturage. In *Rolls* v. *St. George the Martyr, Southwark* (3), Sir George Jessel M.R. treated the former case as deciding that the soil of the street vested in the vestry so as to entitle them to sell it on the closing of the street. This decision was qualified on appeal by the Court of Appeal, who held that the property of the vestry in the highway was determined as soon as the highway ceased to be a highway. In *Wandsworth Board of Works* v. *United Telephone Co.* (4) Sir Baliol Brett M.R. reviewed these decisions, and, adhering to his opinion in *Coverdale* v. *Charlton* (2), pointed out that the case of *Rolls* v. *St. George the Martyr, Southwark* (3), dealt only with the duration, not the extent, of the right conferred. When the authority have used the powers vested in them for that purpose, and have brought into existence a building out of which a profit is made, a building vested in them which they have statutory powers to let, it seems to me difficult to contend that the authority do not come within the words of the Act as "having or holding" a "tenement or hereditament." I think it is impossible to deny that what they hold is an interest in land. In fact this is a stronger case than *Metropolitan Ry. Co.* v. *Fowler* (5), for here the site is actually vested in the local authority, and it could not be suggested here, as it was there, that what they took was an easement only. Here, as there, the persons acquiring the interest are a corporation and acquire it in fee. If it be possible that the respondents might at some time have to abandon and close the convenience, and that in such case their statutory interest in the subsoil might cease, so also, as Lord Watson points out in *Metropolitan Ry. Co.* v. *Fowler* (6), might the Metropolitan Railway lose their interest

(1) [1896] A. C. 434.
(2) 4 Q. B. D. 104.
(3) 14 Ch. D. 785.
(4) (1884) 13 Q. B. D. 904.
(5) [1893] A. C. 416.
(6) [1893] A. C. 416, at p. 426.

C. A. 1904

WESTMINSTER CORPORATION v. JOHNSON. THE SAME v. FULLER.

Collins M.R.

in the site of their tunnel. Unless, then, the fact that the convenience is held subject to the statutory obligation to admit the public at such times as by their regulations they deem fit exempts from rateability, the statutory conditions are fulfilled. We are not, however, dealing with the poor-rate or the paving rate, neither is there any statutory exemption, though the statute does make some exemptions, and this is not Crown land. The objection really goes to quantum, not to rateability, and in the present case if the convenience is a tenement or hereditament, and the corporation "have" or "hold" it, it is undoubtedly being turned to profitable use and has some value. With respect to the conveniences in Fuller's case, the same reasoning applies, though the fact that the expenses exceed the income will presumably be taken into account in assessing the value. This is not the tribunal for determining that question, which would have to be decided as provided in the Act: see s. 8. If and so far as the land tax has been redeemed in respect of any part of the site, a proper allowance must, of course, be made. I am of opinion that the appeal must be allowed.

STIRLING L.J. read the following judgment:—In each of these cases the parties have agreed to submit to the Court the question whether land tax can be assessed in respect of certain conveniences recently constructed by the plaintiffs or their predecessors under a public street, in exercise of the powers conferred by the Public Health (London) Act, 1891, ss. 44 and 45. Land tax was first imposed for one year only by 4 Will. & M., c. 1 (1692). In every subsequent year down to and including 38 Geo. 3 (1797) a similar Act was passed. The last of these annual Acts was 38 Geo. 3, c. 5, which was made perpetual by another Act of the same session, 38 Geo. 3, c. 60, which contained provisions for the redemption and purchase of the tax. Most of the enactments of the last-mentioned statute have been repealed, but re-enacted with variations by 42 Geo. 3, c. 116.

The nature of the existing tax has been considered and explained in two cases—*Reg.* v. *Land Tax Commissioners* (1)

(1) (1853) 2 E. & B. 694; 22 L.J. (Q.B.) 386.

and *Colchester* (*Lord*) v. *Kewney*. (1) The whole of England is for the purpose of this taxation divided into districts, and a fixed annual sum is required to be raised from the land in each of them. The sum to be so raised is assessed yearly by assessors chosen by and acting under the direction of Commissioners appointed for the purpose in each district: 38 Geo. 3, c. 5, s. 8. The assessment is to be "charged with as much equality and indifference as is possible by a pound rate" (s. 4), or, as it is afterwards more briefly expressed (s. 8), "by an equal pound rate" upon all manors, lands, hereditaments, and other premises within the district. There are, however, certain exceptions from this taxation. First, land in the occupation of the Crown at the date when the Act became perpetual is exempt: *Attorney-General* v. *Hill* (2); but land which is Crown property, but not in the occupation of the Crown, is not free: *Colchester* (*Lord*) v. *Kewney*. (3) Secondly, lands belonging to any colleges, hospitals, and other institutions specified in s. 25 are thereby made exempt; this exemption extends only to lands held by such institutions at the date when the tax was made perpetual: *Colchester* (*Lord*) v. *Kewney* (1); but continues as regards such lands even after they have been sold by the institution to which they belonged: *Cox* v. *Rabbits*. (4) Thirdly, lands as to which the land tax has been redeemed are, of course, exempt; but it is provided that the amount of tax so redeemed is to be deducted from the total amount leviable within the district, and the remainder only levied on the lands remaining charged with the tax, as if these had formed an entire district: 38 Geo. 3, c. 60, s. 74; 42 Geo. 3, c. 116, s. 180. The broad result is that all land which was chargeable with the tax at the time when it was made perpetual remains chargeable therewith, unless in the meantime the tax in respect thereof has been redeemed. But, as was pointed out by Channell B. in delivering the judgment of the Court of Exchequer in *Colchester* (*Lord*) v. *Kewney* (5), the amount for which any

(1) (1866) L. R. 1 Ex. 368; (1867) L. R. 2 Ex. 253.
(2) (1836) 2 M. & W. 160; 46 R. R. 542.
(3) L. R. 1 Ex. 368, at p. 380; L. R. 2 Ex. 253, at p. 258.
(4) (1878) 3 App. Cas. 473.
(5) L. R. 1 Ex. 368, at pp. 378, 379.

C. A. 1904

WESTMINSTER CORPORATION v. JOHNSON. THE SAME v. FULLER.

Stirling L.J.

particular piece of land is assessed may vary from year to year, according as its value decreases or increases relatively to the rest of the land in the district. It may even happen that the value may become nominal, in which case the property would in practice not be included in the assessment, and thus would in a sense cease to be assessable. Whether this has taken place or not is a matter for the determination of the Commissioners for the assessment; it is not one on which this Court can be asked to express an opinion, and I do not understand the questions submitted to the Court in these cases to relate to anything of this kind, but to be, in substance, whether the plaintiffs have or hold any messuages, lands, tenements, or hereditaments capable of being assessed to land tax.

Objection is taken on behalf of the plaintiffs to the taxation of the conveniences in question on two grounds—first, the use to which they are applied, and, secondly, the nature of the interest which the plaintiffs have in them. As to the former of these objections, the point is that the conveniences are for the benefit of the public, and that the public cannot be excluded from them. Conveniences have been erected under the authority of the Public Health (London) Act, 1891, which authorizes the sanitary authority to provide and maintain them "in situations where they deem the same to be required." The sanitary authority have power to make them in the subsoil of a road, but there appears to be nothing to prevent the authority from erecting buildings for the purpose above ground. If the plaintiffs had erected such a building on a piece of land acquired for the purpose, and subject at the time of its acquisition to land tax, would land tax cease to be payable merely by reason of the use to which the erection is applied? I fail to see why it should be. The case would not fall within any of the exceptions which I have pointed out. By the statute the tax is, in my opinion, made payable by reason of ownership, not by reason of occupation, and still less by reason of the nature of the occupation. The Brockwell Park case—*Lambeth Overseers* v. *London County Council* (1)—was referred to in this connection. There, however, the liability to poor-rate was in question, and fell to be decided in

(1) [1897] A. C. 625.

reference to statutes expressed in very different terms from those with which we are here concerned. But even as regards liability to poor-rates it does not seem to me clear that the Brockwell Park case would govern. Lord Herschell, in advising the House of Lords, contrasts that case with *London County Council* v. *Churchwardens of Erith* (1), in which the London County Council was held to be rateable to poor-rates in respect of a station and works for pumping sewage. His Lordship said (2): "The land on which the pumping stations were constructed, the rateability of which was there in question, was not by statute dedicated to that use. The London County Council could place their pumping stations where they pleased; they could remove them elsewhere at any time they thought fit, or dispense with them altogether, if they adopted some other method of dealing with their sewage, and could sell or let the land to a tenant, whose use of it would be unrestricted. About the rateability of the land there could be no real controversy." Some of those observations would apply to the hypothetical case which I have put of a building erected on land acquired for the purpose. That, of course, is not the actual case under consideration; but if, as I think, the land which I have supposed to be acquired would not be freed from land tax by reason of the use to which it was put, it seems to me that neither can the existing conveniences be exempted solely by reason of the nature of their use.

It remains, then, to consider whether the plaintiffs have or hold a messuage, land, tenement, or hereditament within the meaning of 38 Geo. 3, c. 5, s. 4. The Public Health (London) Act, 1891, s. 44, sub-s. 2, provides that "for the purpose of such provision" (that is, the provision of such a convenience) "the subsoil of any road shall be vested in the sanitary authority." Sect. 45 provides that where a sanitary authority provide and maintain public lavatories or sanitary conveniences, such authority may (*a*) make regulations and by-laws with respect to the management and user thereof; (*b*) let the convenience "for any term not exceeding three years at such rent and subject to

(1) [1893] A. C. 562. (2) [1897] A. C. at p. 631.

C. A. 1904

WESTMINSTER CORPORATION v. JOHNSON. THE SAME v. FULLER.

Stirling L.J.

such conditions as they may think fit"; and (*c*) "charge such fees for the use of any lavatories or water-closets provided by them as they may think proper." It seems to me that the powers conferred by this section enable the sanitary authority, having made proper regulations and by-laws and fixed reasonable fees for the use of the conveniences specified, to hand over to others the administrative part of their duties in connection therewith, and with that view to let the same for terms not exceeding three years. I think that, when letting is spoken of, the term is used in the ordinary sense. The estate vested in the sanitary authority by s. 44, sub-s. 2, is not defined; but it seems to me that what is to vest is not a mere easement, but such an estate or interest as will enable the authority to perform the duties imposed and to exercise the powers conferred by the Act, including the power of letting. This appears to me to be in accordance with what is laid down in *Metropolitan Ry. Co.* v. *Fowler* (1) and *Tunbridge Wells Corporation* v. *Baird.* (2) This being so, in my opinion the conveniences in question fall under one or other, or even more than one, of the designations of messuages, lands, tenements, or hereditaments held by the sanitary authority within the meaning of 38 Geo. 3, c. 5, s. 4.

It appears that the site of the convenience, which is the subject of the first of these actions, was formerly occupied partly by street and partly by houses; the land tax had been redeemed in respect of one of these houses, but not of the others. The houses were bought by the plaintiffs' predecessors for the purpose of street improvements and thrown into the street. Since that time no land tax has been paid in respect of the site, the reason being, I presume, that the Commissioners regarded the value as nominal merely. It is for the Commissioners and not for this Court to determine whether the structure erected by the plaintiffs (so far as the site consists of land the tax on which has not been redeemed) is or is not of nominal value merely. Similar remarks apply to the conveniences which are the subject of the second action. In my judgment, therefore, the appeal ought to be allowed.

(1) [1893] A. C. 416. (2) [1896] A. C. 434.

MATHEW L.J. read the following judgment:—In these cases I agree with my brother Wright, and am of opinion that his judgment should be affirmed. The Land Tax Act, 1797, s. 4, seems to me to deal with estates known to the common law, which might be held in perpetuity, and the tenure of which was subject to no restrictions. It was contended for the appellants that the word "vested" in the Public Health (London) Act, 1891, s. 44, sub-s. 2, indicated an intention to create an ownership in the plaintiffs. But the sense in which the term is used with respect to the rights granted to local authorities is explained in the cases referred to in the judgment of Wright J. Whether it be the street or the subsoil mentioned in the Act, the position of the plaintiffs seems to me to be the same. They have no property in the ordinary sense. They are not owners or occupiers. They have control as custodians only, and are granted by implication in that capacity such property and authority as will enable them to protect and preserve the rights of the public. In support of the appeal the main reliance was placed on sub-s. 1 of s. 45 of the Public Health (London) Act, 1891. It was urged that the provisions of that sub-section shewed that the plaintiffs were owners in fee of the structures in question. They are empowered to charge for their use, and what was received, it was said, was in the nature of rent. They were further entitled to let them for any term not exceeding three years. It was contended that the plaintiffs therefore possessed the ordinary rights of the landlord. But the charges made to the public are described in the statute as "fees," and, as appears from the agreed facts, they are not made for purposes of profit, but with the object of aiding in meeting the necessary expenditure incurred in the interest of the public, and in order to place some check on a too indiscriminate public user. The fees which are paid are no more rents than the small sums paid for the use of chairs in the public parks. Further, with reference to the power of letting, any demise must be subject to the obligations of the plaintiffs. Provision must be made that the premises should be maintained for the purposes indicated in the statute. What would be received by the tenant would be the difference between the fees paid and

C. A. 1904

WESTMINSTER CORPORATION v. JOHNSON. THE SAME v. FULLER.

Mathew L.J.

necessary outgoings, which, as I have already said, would not be a return in the nature of rent. Further, it must be borne in mind that the right to receive payments from the public and the right to let are both statutory. They do not spring from ownership and would not exist without the sanction of Parliament. The appellants argued that, if the building in Johnson's case was assessable, the other similar structures would be subject to the tax, because of the power which the plaintiffs possessed to make such charges for their use as they thought proper. But this reasoning would seem to involve the consequence that the inclosures provided for similar purposes on the surface of the street would become hereditaments liable to land tax. The case appears to me not to be distinguishable in principle from the Brockwell Park case—*Lambeth Overseers* v. *London County Council* (1)—and the Tooting Common case—*London County Council* v. *Wandsworth Borough Council*. (2) I see no reason in the absence of express enactment for imposing on the ratepayers the additional burden of the land tax. For these reasons it seems to me the appeal should be dismissed.

Appeal allowed.

Solicitors for plaintiffs: *Capron, Hitchings, Brabant & Hitchings.*

Solicitors for defendants: *Miller, Vardon & Miller.*

(1) [1897] A. C. 625. (2) [1903] 1 K. B. 797.

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1904
July 22, 29.

In re WILLIAM WATSON & CO.
Ex parte ATKIN BROTHERS.

Bankruptcy — Order and Disposition — Reputed Ownership — Possession by Bankrupt "in his Trade or Business" — Consent of true Owner — Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), s. 44.

In order to establish that goods were within s. 44 of the Bankruptcy Act, 1883, in the order and disposition of the bankrupt as reputed owner at the commencement of the bankruptcy, it is essential that the true owner should have consented to a state of things necessarily leading to the inference of ownership by the bankrupt, and in determining the question of the consent of the true owner the real relation of the parties must be taken into consideration.

The bankrupts carried on business as bankers and East India agents, and in connection with that business they sold goods upon commission. Upon the invitation of the bankrupts the applicants, who were wholesale silversmiths, sent certain plated goods to the bankrupts' office to be exhibited in show-cases as samples, and the goods were to remain at the risk of the applicants. The usual practice of the bankrupts was to introduce their customer to the applicants, who supplied him from their warehouse with goods corresponding to the samples, but in cases of urgency the bankrupts sold the samples themselves :—

Held, that the goods were not in the reputed ownership of the bankrupts.

Sharman v. *Mason*, [1899] 2 Q. B. 679, explained and distinguished.

THIS was an appeal from a decision of Wright J. in bankruptcy.

Prior to their bankruptcy Messrs. William Watson & Co. carried on business as bankers and East India agents, and they had also a commission and shipping agency department. Their head office was in Waterloo Place, London, and they had several branch offices in India and in other parts of the world. They had a large Anglo-Indian connection.

In February, 1904, they were adjudicated bankrupt upon their own petition.

At this date they had in their possession certain electro-plated goods belonging to Messrs. Atkin Brothers, a wholesale firm of silversmiths and electroplaters. Messrs. Atkin Brothers

C. A. 1904

WATSON & Co., *In re.* ATKIN BROTHERS, *Ex parte.*

applied for an order upon the trustee in the bankruptcy for delivery up of the goods or for payment of their value, 23*l.* 4*s.* 3*d.* The trustee in the bankruptcy claimed the goods as being in the order and disposition of the bankrupts.

It appeared that in the summer of 1903 the bankrupts, having obtained some additional space at their offices in Waterloo Place, fitted up the first-floor with show-cases, and invited a number of wholesale houses to send them sample goods for exhibition in these show-cases with a view to the customers of the bankrupts ordering goods from the samples. On June 2, 1903, they wrote to the applicants from Waterloo Place on letter-paper in which they were described as bankers and agents: "We are now in our new offices in the same building, and have various show-cases to furnish. It has occurred to us that you might care to place a few samples with us, which would doubtless have the effect of materially increasing our account with you. If at any time you are this way we should be glad to arrange a position for your goods." In answer to this letter the applicants on July 10, 1903, sent the goods which they now claimed to have delivered up to them to the bankrupts' office to be exhibited as samples, and they also sent a list of the trade prices of the goods. Shortly afterwards the bankrupts wrote to the applicants stating that they had noticed a slight discoloration in the goods, and asking whether they should retain them any longer. To this the applicants replied that the goods should be retained. From time to time orders were received by the applicants from the bankrupts requesting them to supply goods corresponding with the samples to customers of the bankrupts. The usual practice of the bankrupts was to introduce the customer to the manufacturer with a written request to the manufacturer to supply him with goods up to a certain amount, and a notice that the purchase was made on the bankrupts' account. The purchase-money was paid by the customer to the bankrupts. It appeared, however, that in exceptional cases of urgency the goods would be sold by the bankrupts direct from the show-cases.

There was nothing in the show-cases to indicate who were the manufacturers of the various goods which were there

exhibited. The bankrupts also stocked certain goods, such, for example, as military accoutrements, and in some instances these goods were exhibited in their show-cases. They also used a form of invoice containing a long catalogue of the various goods supplied by them. In this invoice the bankrupts were not described as bankers and agents, and the list of goods comprised both goods which they sold on their own account and goods which they sold as agents.

Wright J. was of opinion that the case was covered by *Sharman* v. *Mason* (1), and refused the application.

The applicants appealed.

Rawlinson, K.C., and *Muir Mackenzie*, for the applicants. The bankrupts were not silversmiths, but bankers and agents, and these goods were not in the possession of the bankrupts for the purpose of their trade or business, but for the purpose of the trade or business of Atkin Brothers. The question is not what the bankrupts did, but what Atkin Brothers consented to. They consented to the goods being exhibited as samples in show-cases for the purposes of being seen and orders taken from them. If the bankrupts did in fact act as vendors, Atkin Brothers never consented to it. The true owner must consent to such a possession as would carry reputed ownership with it: *Ex parte Bright* (2); *Load* v. *Green* (3); *Belcher* v. *Bellamy* (4); *Colonial Bank* v. *Whinney*. (5)

[VAUGHAN WILLIAMS L.J. referred to *Ex parte Wingfield*. (6)]

Sharman v. *Mason* (1), upon which Wright J. relied, was wrongly decided, because the judge left out of consideration the consent of the true owner.

Herbert Reed, K.C., and *E. Clayton*, for the trustee in bankruptcy. It is not necessary in order to shew that goods are in the possession of a bankrupt for the purpose of his trade or business that the bankrupt should be able to sell the goods in the course of his business if they are used in connection with

(1) [1899] 2 Q. B. 679.
(2) (1879) 10 Ch. D. 566.
(3) (1846) 15 M. & W. 216.
(4) (1848) 2 Ex. 303.
(5) (1886) 11 App. Cas. 426.
(6) (1879) 10 Ch. D. 591.

C. A. 1904

WATSON & Co., *In re* ATKIN BROTHERS, *Ex parte.*

the business: per Cotton L.J. in *Colonial Bank* v. *Whinney*. (1) There never is a consent in so many words to the bankrupt appearing as owner; that is not to be expected; the consent must be to the circumstances from which reputed ownership can be inferred: *Ex parte Watkins*. (2)

[VAUGHAN WILLIAMS L.J. That was a case in which the bankrupt having been the owner parted with the title while retaining the possession. In that case reputed ownership will be much more easily inferred than in a case where the bankrupt has never been the owner.]

It is submitted that there is no material difference between the two cases. The proper inference from the facts in this case is that these are goods sent to the bankrupts on sale or return. There is nothing to distinguish these goods from the goods stocked by the bankrupts.

Muir Mackenzie, in reply.

[The following cases were also referred to: *Joy* v. *Campbell* (3); *Livesay* v. *Hood* (4); *Ex parte Nassan*. (5)]

Cur. adv. vult.

VAUGHAN WILLIAMS L.J. read the following judgment of the Court (Vaughan Williams, Romer, and Cozens-Hardy L.JJ.):—

The question in this case is whether, at the commencement of the bankruptcy, certain goods were "in the possession, order, or disposition of the bankrupt in his trade or business, by the consent and permission of the true owner, under such circumstances that he was reputed owner thereof." In our opinion it is essential before a Court can hold that one man's goods are to be taken to pay another man's debts, because of the reputation of ownership of the bankrupt, that the goods should be held and dealt with by the bankrupt in such manner and under such circumstances that the reputation of ownership must arise. We think that the cases of *Load* v. *Green* (6) and *Smith* v. *Hudson* (7) fully establish this

(1) (1885) 30 Ch. D. 261, 274.
(2) (1873) L. R. 8 Ch. 520, 528.
(3) (1804) 1 Sch. & Lef. 328; 9 R. R. 39.
(4) (1809) 2 Camp. 83; 11 R. R. 669.
(5) (1886) 3 Morr. 51.
(6) 15 M. & W. 216.
(7) (1865) 34 L. J. (Q.B.) 145.

proposition. Blackburn J. in his judgment in *Smith* v. *Hudson* (1) said: "*Load* v. *Green* (2) decides that the true owner as such must consent that the other side should be reputed owner, not being true owner." The doctrine of reputed ownership was first embodied in the Bankruptcy Act, 21 Jac. 1. It has been couched in various words in the successive bankruptcy statutes, but this principle has run through them all, and the statement of Lord Redesdale in *Joy* v. *Campbell* (3) (a case which has been approved and acted on again and again: see *Belcher* v. *Bellamy* (4), *Hamilton* v. *Bell* (5), and many other cases), that the true owner must have unconscientiously permitted the goods to remain in the order or disposition of the bankrupt, justifies this statement. This does not mean, as we understand it, that he must have intended that false credit should be obtained by the bankrupt's apparent possession of the goods, but it does at least mean that the true owner of the goods must have consented to a state of things from which he must have known, if he had considered the matter, that the inference of ownership by the bankrupt must (observe, not might or might not) arise: see *Hamilton* v. *Bell* (5); *Gibson* v. *Bray* (6); *Ex parte Bright.* (7) The question for us then is, Did Messrs. Atkin consent to the possession by the bankrupts, Messrs. Watson, under such circumstances that customers were entitled to assume that Messrs. Watson were the owners of the goods in their trade or business? Now it is obvious that in deciding this question as to the consent of the true owner, one cannot leave out of consideration the true relation of the parties. The parties were not in fact vendors and purchasers; they were in fact principals and agents. There is, as Sir George Jessel pointed out in *Ex parte Bright* (7), nothing to prevent a principal remunerating his agent by paying a commission depending upon the surplus which the agent can obtain over and

(1) 34 L. J. (Q.B.) 145, 151.
(2) 15 M. & W. 216.
(3) 1 Sch. & Lef. 328, 336; 9 R. R. 39.
(4) 2 Ex. 303.
(5) (1854) 10 Ex. 545.
(6) (1817) 8 Taunt. 76; 19 R. R. 460.
(7) 10 Ch. D. 566.

C. A. 1904

WATSON & Co., *In re.* ATKIN BROTHERS, *Ex parte.*

Vaughan Williams L.J.

above the price which will satisfy the principal; but of course the sale must not, with the consent of the true owner, take place under circumstances from which customers generally will be entitled to presume that the goods must be, not may or may not be, the property of the bankrupt. Now what are the circumstances of this case? The correspondence makes it clear that Messrs. Watson received the goods as samples or patterns, and that they were not stocking the goods as their own. The goods obviously were to remain at the risk of Messrs. Atkin, and Messrs. Watson undertook to return them if they became tarnished. There is nothing in the written arrangement to authorize Messrs. Watson to take upon themselves the order and disposition of the goods. They could not sell them below the price fixed by Messrs. Atkin, as a price which would suffice them. But then it is said that in fact Messrs. Watson dealt with the goods in their trade or business in such a fashion that customers could not but presume that the goods were dealt with by Messrs. Watson at their unfettered order and disposition. Now this will not affect Messrs. Atkin unless they consented to the goods being so dealt with by Messrs. Watson. Now did they do so? In the first place, Messrs. Watson were in fact described in their business as "bankers and agents." The letters in which Messrs. Watson invited Messrs. Atkin to place samples with them are so headed, and we do not think that the fact that the bankrupts also dealt in goods which they stocked, and used suitable invoices for that part of their business, would entitle customers to presume that no part of the business of Messrs. Watson was done by them as agents. The fact that they are so described as agents is not, however, conclusive, because the evidence may shew that in truth and fact they were dealing with these goods as though they were owners dealing with the goods as owners in their own business with the consent of Messrs. Atkin: see *Ex parte White* (1); but it is an element which cannot be left out of consideration in dealing with the question what were the circumstances under which Messrs. Atkin consented that the bankrupts should have possession of these goods.

(1) (1871) L. R. 6 Ch. 397.

In the next place, it seems to us that, notwithstanding the fact that Messrs. Watson occasionally sold the samples and Messrs. Atkin did not object, yet the samples were generally so dealt with by Messrs. Watson that it must have occurred to the mind of the customers that these goods were not being dealt with by Messrs. Watson in the way in which they dealt with their own goods stocked by them. Their practice in sending the customers an introduction to Messrs. Atkin was also strongly suggestive of agency. We do not think that this is a case in which the true owners of the goods by their unconscientious conduct or "laches" had acquiesced in the bankrupts so dealing with the goods as to allow them to hold themselves out as the owners of the goods, or induce customers to presume such ownership. With regard to the judgment of Wright J., although he says that, apart from the case of *Sharman* v. *Mason* (1), he holds that these goods were in the reputed ownership of Messrs. Watson, yet the principal ground of his judgment is the decision in *Sharman* v. *Mason* (1), and he gives leave to appeal because he says that *Sharman* v. *Mason* (1) may require consideration. We do not think that Wright J. rightly understood the decision in *Sharman* v. *Mason.* (1) He says *Sharman* v. *Mason* (1) lays down that wherever goods are in possession of a bankrupt for the purpose of trade or business they are in the reputed ownership of the bankrupt, irrespective of whether there is or is not a power of sale. But we do not think that the decision means that. Certainly under the old law the question of reputed ownership was a question of fact in each case, and we do not think that the alteration of the words from what they were in the Act of 1869, "being a trader," into the words as they appear in the Act of 1883, "in his trade or business," has made any difference in this respect. We think this appeal ought to be allowed, with costs.

Appeal allowed.

Solicitors: *Ernest de Buriatte; Rising & Ravenscroft.*

(1) [1899] 2 Q. B. 679.

H. B. H.

1904
Aug. 2.

In re SOLOMONS.
Ex parte SOLOMONS.

Bankruptcy—Practice—Trustee's Record Book—Minutes of Committee of Inspection—Debtor's Claim to inspect—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 80—*Bankruptcy Rules*, 1886, *rr.* 285, 292.

As a general rule a debtor is not entitled to inspect the minutes of meetings of the committee of inspection and other matters that his trustee in bankruptcy enters in the record book kept by him pursuant to s. 80 of the Bankruptcy Act, 1883, and rule 285 of the Bankruptcy Rules, 1886.

THIS was an application by the debtor to inspect the "record book" of the trustee in bankruptcy under these circumstances.

On December 15, 1898, the debtor was adjudicated a bankrupt, and a trustee was appointed with a committee of inspection.

In March, 1899, he applied for his discharge, which was refused. In April, 1899, he was prosecuted for an offence under the Debtors Act, 1869, namely, making a false entry in one of his books, and was convicted, but under the circumstances was only ordered to come up for judgment if called upon. In April, 1900, he renewed his application for discharge, and was again refused. In the meantime his estate had paid a first and final dividend of 5*s.* in the pound; the trustee in bankruptcy had passed his accounts and been discharged, and had handed over all books, documents, and papers to the official receiver. (1)

(1) The Bankruptcy Act, 1883, s. 80, enacts: "The trustee shall keep, in manner prescribed, proper books in which he shall from time to time cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed, and any creditor of the bankruptcy may, subject to the control of the Court, personally or by his agent inspect any such books."

The Bankruptcy Rules, 1883, provide: "Rule 285. The official receiver, until a trustee is appointed, and thereafter the trustee, shall keep a book to be called the 'record book,' in which he shall record all minutes, all proceedings had, and resolutions passed at any meeting of creditors, or of the committee of inspection, and all such matters as may be necessary to give a correct

1904

SOLOMONS, *In re.* SOLOMONS, *Ex parte.*

In May, 1903, the debtor again applied for his discharge, and eventually in December, 1903, the Court of Appeal made an order suspending his discharge for six years from January 17, 1899.

On May 5, 1904, the debtor applied to the Inspector-General in Bankruptcy for leave to inspect the minutes of a meeting of the committee of inspection held on February 23, 1899, and was referred to the official receiver, who informed the debtor that, although he was not entitled to inspect the minute book, he might inspect the minute in question. Subsequently the debtor applied to the official receiver for permission to search the entire record of minutes, letters, and other papers. This the official receiver refused to allow; and the Inspector-General declined to interfere with the discretion of the official receiver. Thereupon the debtor applied to the Court for an order to be permitted to inspect all records of the minutes of the meetings of the committee of inspection and copies of letters addressed to certain creditors by the trustee. By his affidavit filed in support of the application the debtor deposed that he desired the inspection in question to clear himself from the stigma of his prosecution under the Debtors Act, 1869; and to shew that that prosecution was the outcome of a conspiracy to which the trustee was a party, and that the trustee had committed wilful perjury in the matter.

The Debtor appeared in person.

Muir Mackenzie, for the official receiver. It is contrary to the settled practice to allow this inspection. A debtor has no right to inspect the papers in the bankruptcy except those that are on the Court file. Sect. 80 of the Act gives creditors the

view of his administration of the estate, but he shall not be bound to insert in the record any document of a confidential nature (such as the opinion of counsel on any matter affecting the interest of the creditors), nor need he exhibit such document to any person other than a member of the committee of inspection."

"Rule 292. Upon a trustee resigning, or being released or removed from his office, he shall deliver over to the official receiver, or, as the case may be, to the new trustee, all books kept by him, and all other books, documents, papers, and accounts in his possession relating to the office of trustee."

1904

SOLOMONS, *In re.* SOLOMONS, *Ex parte.*

right to inspect the record book of the trustee, but is silent as regards the bankrupt. The record book contains the minutes of the proceedings of the committee of inspection, who are appointed by the creditors, and who take advice on behalf of the creditors. As a question of principle, it will be creating a very dangerous precedent if this inspection is allowed.

The Debtor, in reply.

BIGHAM J. I think this application must be refused. It is against the practice of the Court to permit a debtor to make an inspection of this kind, and the affidavit does not satisfy me that there are any exceptional circumstances to justify me in departing from the practice. I gather that the object of the application is to enable the bankrupt to formulate some charges against the trustee. I do not think that I ought to allow him inspection for that purpose.

Solicitor for official receiver: *The Solicitor to the Board of Trade.*

H. L. F.

CHENEY *v.* TALLOWIN.

1904
July 11.

Poor Law—Rate—Form of—Statement of Period for which estimated—Retrospective Rate—Distress Warrant—Poor Rate Assessment and Collection Act, 1869 (32 & 33 *Vict. c.* 41), *s.* 14.

A poor-rate, which states in the heading that it is estimated to meet all the expenses that will be incurred before the ——— day of ——— next, sufficiently states "the period for which the same is estimated" to satisfy the requirements of s. 14 of 32 & 33 Vict. c. 41, although it does not specify the date at which the expenses begin.

If a poor-rate is made after the commencement of a half-year to meet the expenses of the whole half-year, the objection that the rate is in part retrospective is not one that can be taken on the hearing of an application for a distress warrant.

CASE stated by justices for the county of Norfolk.

At a Court of summary jurisdiction held at Swainsthorpe in the county of Norfolk on March 4, 1904, a complaint was preferred by the appellant, acting as assistant overseer of the parish of Bramerton in the said county, that the respondent, being duly rated to the relief of the poor of the said parish by a poor-rate made November 6, 1903, in respect of a house and farm land in the sum of 5*s.* 4½*d.*, had not paid the same or any part thereof, but had refused to do so. The following facts were proved or admitted:—

The sum in question was part of a larger sum the balance of which had been duly paid by the respondent without demur. The following is a copy of the heading of the rate:—

"Parish of Bramerton, Norfolk.

"Rate made November 6, 1903.

"An assessment for the relief of the poor of the parish of Bramerton in the county of Norfolk and for other purposes chargeable thereon according to law made the 6th day of November, 1903, after the rate of one shilling and sixpence in the £, on buildings and other hereditaments not being agricultural land and at one-half of the said rate on agricultural land, which is estimated to meet all the expenses for the above

1904

CHENEY v. TALLOWIN.

purposes which will be incurred before March 25 next, and which rate we declare to be payable by two equal instalments, that is to say, in November and February next."

At the hearing the appellant produced the rate-book shewing the making, allowance, and publication of the rate, and proved the rating of the respondent and non-payment of the demand. The precepts or contribution orders from the guardians of the Henstead Union to meet which the rate in question was made were dated October 8, 1903, and the meeting of overseers at which the rate was made was held shortly after that date. The respondent came into occupation of his premises on October 11, and the rate was allowed by the justices on November 6. The appellant produced contribution orders served on him in the previous half-year which were expressed to be in respect of expenses to be incurred by the guardians up to September 29, 1903. The respondent refused to pay the 5*s.* 4½*d.* upon the ground that that sum represented the proportion of the rate for the period between September 29 and October 11, and he claimed that he was not liable to pay that portion of the rate which was intended to meet expenses incurred at a date when he was not in possession of the premises.

The justices found as a fact that the rate, though it was not so stated in the heading, was intended to cover the expenses of the period of six months from September 29, 1903, to March 25, 1904, and they held that the respondent was not liable for the proportion of the rate for the time when he was not in occupation, and they accordingly dismissed the complaint. The question for the opinion of the Court was whether they were bound to issue a distress warrant for the unpaid balance of the rate.

Walter Ryde, for the appellant. The justices had no jurisdiction to entertain the respondent's objection to the payment of the rate. Their duty upon an application for a distress warrant for non-payment of a rate "is simply to see there is such a rate as alleged, that the party summoned is the person named in the rate, and that he has not paid his assessment; after which inquiry the duty of magistrates is simply minis-

terial": per Cockburn C.J., *Ex parte May*. (1) If the rate is in due form, not bad on the face of it, and the person rated was admittedly in occupation at the date of the rate, the justices cannot go into any question behind the rate, unless it can be shewn that there was no jurisdiction to make any rate at all upon the person objecting, as where the property occupied by him is outside the parish. Here the defendant admitted he was in occupation of property in the parish at the date of the rate. It is no answer to an application for a distress warrant that the rate is for past expenses: *Reg.* v. *Kingston*. (2) The heading of the rate here followed the form given in the Agricultural Rates Order, 1896, Sched. Y. Secondly, assuming that the justices were entitled to go behind the rate, they were wrong upon the merits. The period for which a rate is made is to be taken as commencing, not from the termination of the preceding half-year, but from the making of the rate, which by 32 & 33 Vict. c. 41, s. 17, is to be deemed to be the date of the allowance by the justices—in this case November 6. This seems clear from the case of *Reg.* v. *Tempest*. (3) There the respondent was rated in respect of certain houses, the rate being made on June 19, and being designed to cover expenses from the preceding Lady Day. The houses, which were newly built, were not completed till just before the date of the making of the rate. The respondent objected to pay a proportionate part of the rate for the period during which the houses were not in existence as rateable subjects, and on an application for a distress warrant the justices allowed the objection and refused to issue the distress warrant for the whole amount of the rate. But the Divisional Court held that the justices had no jurisdiction to say that only a proportionate part should be levied. The rate operated from June 19, at which date the houses were occupied, and the respondent was consequently liable for the full amount.

The case of *Davis* v. *Woodfield* (4) is to the same effect. There a rate was allowed on October 21, 1898, to cover expenses

(1) (1862) 31 L. J. (M.C.) 161.
(2) (1858) E. B. & E. 256.
(3) (1898) 14 Times L. R. 199.
(4) (1900) 81 L. T. 782.

1904

CHENEY v. TALLOWIN.

from the preceding Michaelmas to the following Lady Day. The appellant was rated in respect of premises occupied by him from before September 29, 1898, up to November 30, 1898, when he went out of occupation. By s. 16 of 32 & 33 Vict. c. 41, "An outgoing occupier shall remain liable for so much and no more of the rate as is proportionate to the time of his occupation within the period for which the rate was made." The period between Michaelmas and Lady Day is 177 days; between Michaelmas and November 30 is 62 days; between October 21 and Lady Day is 155 days; and between October 21 and November 30 is 40 days. And the question was whether the appellant was liable for $\frac{40}{155}$ or for $\frac{62}{177}$ of the total amount of the rate. It was held that he was only liable for the former, for "the period for which the rate was made" was to be computed as commencing on October 21.

W. H. Stevenson, for the respondent. The rate was bad on the face of it; for s. 14 of 32 & 33 Vict. c. 41 provides that "the overseers of every parish when they make a poor-rate shall set forth in the title of the rate the period for which the same is estimated." A period implies two termini, the date of commencement and that of the end. Here no date of commencement is specified. It was not intended by the Agricultural Rates Order, 1896, to alter the provisions of s. 14. This point was raised in *Davis* v. *Woodfield* (1); but the Court expressed no opinion upon it. Further, the words "the period for which the same is estimated" shew that whatever the former rule may have been as to the commencement of the rate, the period for which the rate is made must now be taken to be contemporaneous with the period of the expenses incurred. Here the period of the estimate began on September 29, before the respondent came into occupation. If, however, the rate is to be taken to commence on November 6, then, as it covered expenses back to September 29, it was to that extent a retrospective rate, and was consequently bad. If the overseers here had done their duty and had got the rate allowed immediately

(1) 81 L. T. 782.

after September 29, the respondent would not have been in occupation at the date of the rate made, and would consequently not have been liable until his occupation commenced. He ought not to suffer for the overseers' delay.

LORD ALVERSTONE C.J. In cases on the subject of distress warrants for rates which we have had before us on previous occasions we have more than once said that we do not pretend to give an exhaustive enumeration of all the objections that may be taken on the application for the warrant; it is enough to decide in each case whether the particular objection taken is a valid one or not. Here a rate was made on November 6, to meet a precept of the guardians dated October 8, and alleged to be in respect of expenses from September 29 to March 25. The respondent's occupation of the premises for which he was rated began on October 11, and he objected to pay the proportion of the rate applicable to the expenses incurred before that date. That is clearly not an objection which can be taken on the application for a distress warrant. If the authorities be examined it will be seen that the principle acted upon in *Reg.* v. *Tempest* (1) and *Davis* v. *Woodfield* (2) is the right one—namely, that the date of the allowance of the rate is to be taken as the date of the commencement of the period for which the rate is made. It may be that, if the rate is intended to cover expenses incurred before that date, on appeal against the rate objection may be taken that the rate is bad as being retrospective: *Waddington* v. *London Union* (3); but whether that is so or not, it is not one which can be raised in answer to an application for a warrant: *Reg.* v. *Kingston.* (4) It is contended that though that may have been the law in former times, it has been altered by s. 14 of 32 & 33 Vict. c. 41, which says that the title of the rate shall specify "the period for which the same is estimated," and that the period for which it is estimated is the period during which the expenses are incurred which the rate is to meet—in other words,

(1) 14 Times L. R. 199.
(2) 81 L. T. 782.
(3) (1858) E. B. & E. 370.
(4) E. B. & E. 256.

1904

CHENEY v. TALLOWIN.

Lord Alverstone C.J.

that it commences now with the expiry of the preceding half-year. With that contention I cannot agree. I think the words mean nothing more than the period for which the rate is made. The section was drafted with reference to the existing law that the starting-point was the date of the making of the rate, and it was merely to give the ratepayers notice of the date up to which the rate was to operate. There is consequently nothing in the point that the rate is bad on the face of it on the ground of a supposed omission to state the two termini of the period. I am of opinion that the appeal must be allowed.

KENNEDY and PHILLIMORE JJ. concurred.

Judgment for appellant.

Solicitors for appellant: *Crowders, Vizard & Oldham, for Mills & Reeve, Norwich.*

Solicitors for respondent: *Rawlings & Butt, for W. E. Keefe, Norwich.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1904
March 11, 14, 15, 16:
May 17.

In re REIS.
Ex parte CLOUGH.

Bankruptcy — Fraudulent Conveyance — Marriage Settlement — Husband's Covenant to settle all After-acquired Property except Business Assets— Contingent Liability — Provable Debt — Release by Bankruptcy and Discharge—Assignment to Marriage Settlement Trustees of House and Furniture acquired during Coverture—Act of Bankruptcy—Notice to suspend Payment—Bill of Sale—Registration—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*h*); *s.* 37; *s.* 47, *sub-s.* 2—13 *Eliz. c.* 5—*Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 8.

In 1879 R. by his marriage settlement covenanted to transfer all his after-acquired property (except business assets) to the trustees of the settlement upon trusts for the benefit of his wife and children. In 1880 he was adjudicated a bankrupt, and he obtained his discharge in 1882. In 1901, out of the profits of his business of outside broker, he purchased and furnished a house where he resided with his wife and children. On May 26, 1903, he intimated to his Stock Exchange creditors, who were substantially his only unsecured creditors, that he would be unable to pay in full his Stock Exchange liabilities which would fall due at the ensuing settlement, and gave leave to each of them individually to close his account immediately. On June 10, in pursuance of a notice served on him by the trustees of his marriage settlement, he transferred to them by two deeds his house and furniture. On July 15 he was adjudicated a bankrupt upon an act of bankruptcy committed on June 25 :—

Held, (1.) (reversing the judgment of Wright J.), that the notice to creditors on May 26 was not an act of bankruptcy within sub-s. 1 (*h*) of s. 4 of the Bankruptcy Act, 1883; (2.) that the marriage settlement was not a fraudulent conveyance within 13 Eliz. c. 5; (3.) that the covenant to settle after-acquired property was not too vague or general to be enforced by the Court; (4.) that the liability under the covenant was not a provable debt within the meaning of the Bankruptcy Acts of 1869 and 1883, and was not released by the bankruptcy of 1880 and the subsequent discharge; (5.) that the deed of assignment of the furniture, being executed in pursuance of the covenant in the settlement and being in the nature of a further assurance, was a marriage settlement within the exception in s. 4 of the Bills of Sale Act, 1878, and did not require registration as a bill of sale :

Held, therefore, that the deeds of June 10, being executed before an act

C. A.
1904
Reis, *In re.*
Clough, *Ex parte.*

of bankruptcy was committed, were not void as against the trustee in bankruptcy under s. 47 of the Bankruptcy Act, 1883, or otherwise.

Ex parte Bolland, (1873) L. R. 17 Eq. 115, overruled.

Collyer v. *Isaacs*, (1881) 19 Ch. D. 342, and *Hardy* v. *Fothergill*, (1888) 13 App. Cas. 351, distinguished.

Appeal from a decision of Wright J. (1)

In 1879 the bankrupt, Arthur Montagu Reis, married Miss Lilian Samuel, and by a settlement dated September 9, 1879, made in contemplation of the marriage, it was agreed and declared "that all real and personal property (if any) (except business assets of the said Arthur M. Reis) not hereinbefore settled to which the said A. M. Reis and L. Samuel or either of them at the time of the said intended marriage or the said L. Samuel or Arthur Montagu Reis in his own right or in the right of the said L. Samuel at any time during the joint lives of the said A. Montagu Reis and L. Samuel shall be or become entitled whether in possession, reversion, or otherwise" (except trinkets, jewels, ornaments of the person, plate, linen, china, furniture, pictures, prints, books, and articles of the like nature belonging to the said L. Samuel at the time of the marriage or acquired by her during coverture, and except also any legacy or other property acquired by the said L. Samuel at one and the same time not exceeding in amount or value the sum of 200*l.*), "shall so soon as circumstances will admit and at the cost of the trust estate be assured and transferred by the said A. M. Reis and L. Samuel respectively and all other necessary and proper parties (if any) unto or otherwise vested in the said trustees or trustee" upon the trusts of the settlement. Those trusts were for the wife for life for her separate use without power of anticipation, and after her decease for the children of the marriage as therein mentioned, and in default of children for the husband absolutely.

At the time of his marriage Reis was carrying on the business of a foreign banker and West African merchant, which he had purchased from his mother for 3000*l.*, but he only paid 250*l.* of the purchase-money, and as he was unable to pay the balance the business came to an end. On September 6, 1880, Reis

(1) [1904] 1 K. B. 451.

was adjudged bankrupt, and he obtained his discharge on October 27, 1882. The trustees of the marriage settlement did not prove in this bankruptcy in respect of Reis's liability under his covenant to settle after-acquired property. In 1882 Reis commenced business as a jeweller, and in 1883 he again started business as a West African merchant. In 1894 he executed an inspectorship deed for the benefit of his creditors, which resulted in a dividend of 5*s.* in the pound being paid. In the same year he became an outside stockbroker. In 1901 he had made profits out of this business exceeding 50,000*l.*, and he then invested several thousand pounds in purchasing and furnishing a freehold house in Holland Park, where he resided with his wife and family until his present bankruptcy. In April, 1903, being then in financial difficulties, he executed a charge in favour of the Capital and Counties Bank for 3200*l.*, and this charge was still subsisting.

On May 26, which was contango day on the Stock Exchange, Reis instructed his solicitor, Mr. Spyer, to see Mr. Hart and Mr. Lumsden, who were his two largest Stock Exchange creditors, with reference to his accounts with them. On this day the amount which would be payable by Reis at the next ensuing settlement would be ascertained at mid-day, but that amount would not be actually payable till May 29. Spyer informed Hart and Lumsden that Reis would have a difficulty in paying them on May 29, and that he had Reis's authority to permit them if they saw fit to close their accounts with him immediately. Hart suggested that if there were any other Stock Exchange creditors they ought to have the same liberty. Spyer agreed to do this, and on the same day he communicated with Reis's only two other Stock Exchange creditors, Messrs. Harris & Davis and Messrs. F. W. Elliott & Co., and gave them the like permission. All these creditors immediately closed their accounts and took proceedings to recover their debts. Besides these creditors the only other creditors for any considerable sum were the Capital and Counties Bank, to whom Reis then owed 1100*l.* under the charge. Judgments were obtained against Reis on June 13 by Harris & Davis for 2596*l.* 11*s.* 7*d.*, on June 22 by Angel, Hart & Co. for

C. A. 1904

REIS, *In re.* CLOUGH, *Ex parte.*

3747*l.* 0*s.* 6*d.*, on June 23 by Lumsden's firm for 2441*l.* 1*s.* 2*d.*, and on June 29 by F. W. Elliott & Co. for 1323*l.* 13*s.* 1*d.*

On July 15 a receiving order was made against Reis on a petition presented on June 25 by Messrs. Harris & Davis, the act of bankruptcy alleged being that Reis had failed to comply on June 25 with the requirements of a bankruptcy notice served on him on June 16 by the petitioning creditors.

In the meantime, on June 10, 1903, Reis, in pursuance of a written notice served upon him on the previous May 23 by the trustees of his marriage settlement, by two deeds conveyed and assigned to them the freehold house and furniture to be held by them upon the trusts of the settlement; but there was no actual transfer of the furniture to the trustees of the settlement.

The trustee in bankruptcy alleged that Reis had committed an act of bankruptcy on May 26 within the meaning of sub-s. 1 (*h*) of s. 4 of the Bankruptcy Act, 1883, and moved (1.) to set aside the two deeds of June 10 on the grounds—(*a*) that they were voluntary settlements; (*b*) that they were fraudulent conveyances within the meaning of the Fraudulent Conveyances Act of 13 Eliz. c. 5; (*c*) that they were executed after the commencement of the bankruptcy; (*d*) that the assignment of chattels was void under the Bills of Sale Acts; (2.) that, if and in so far as necessary, the marriage settlement of September 9, 1879, might be declared fraudulent and void as against the creditors of the bankrupt; and in argument the further point was taken that Reis's liability under the covenant in his marriage settlement was released by the bankruptcy of 1880 and the discharge in 1882. Wright J. held that the notice given to the creditors on May 26 constituted an act of bankruptcy, and that Reis became bankrupt on that date; and consequently that the deeds of June 10 were void against the trustee in bankruptcy so far as might be necessary to pay the debts in the bankruptcy.

The trustees of the marriage settlement appealed.

After the appeal had been opened, in answer to a suggestion of the Court, it was arranged that Mrs. Reis should be joined as an appellant for the purpose of determining the question

whether the marriage settlement was void under the statute of Elizabeth.

Horridge, K.C., and *Muir Mackenzie*, for the appellants. In order that a debtor may commit an act of bankruptcy within the meaning of s. 4, sub-s. 1 (*h*), of the Bankruptcy Act, 1883, by a notice that he has suspended, or is about to suspend, payment of his debts, the statement must be that the debtor is unable to pay any of his debts. It is essential, as was said by Vaughan Williams J. in *In re Scott* (1), that the debtor should be "dealing with his creditors as a body": see also *Ex parte Oastler* (2); *Crook* v. *Morley* (3); *Trustee of Lord Hill* v. *Rowlands*. (4) There was here nothing more than the debtor going to one creditor and saying, "I shall not be able to pay you." Nothing was said about the general body of creditors.

Herbert Reed, K.C., *A. J. David*, and *B. Adler*, for the respondent. *Ex parte Oastler* (2) is inconsistent with *Crook* v. *Morley*. (3)

[VAUGHAN WILLIAMS L.J. We wish to hear you upon the other points in the case.]

1. The settlement of September 9, 1879, was fraudulent under the statute of Elizabeth. A covenant by a trader on his marriage settlement to settle all his after-acquired property is void as against his creditors in a subsequent bankruptcy: *Ex parte Bolland*. (5)

[VAUGHAN WILLIAMS L.J. referred to *Ex parte Games*. (6)]

That case was decided on the ground that a debtor might lawfully sell all his property to pay one creditor.

[VAUGHAN WILLIAMS L.J. I think the Court there declined to hold that an agreement by a trader to assign his after-acquired property is necessarily fraudulent.

COZENS-HARDY L.J. I am not satisfied that *Ex parte Games* (6) is inconsistent with *Ex parte Bolland*. (5)]

The deed in question in *Ex parte Games* (6) was a bill of sale by way of security. *Alton* v. *Harrison* (7) does not shew that

(1) [1896] 1 Q. B. 619, 624.
(2) (1884) 13 Q. B. D. 471.
(3) [1891] A. C. 316.
(4) [1896] 2 Q. B. 124, 128.
(5) L. R. 17 Eq. 115.
(6) (1879) 12 Ch. D. 314.
(7) (1869) L. R. 4 Ch. 622.

C. A. 1904

REIS, *In re.* CLOUGH, *Ex parte.*

such a deed as this is not fraudulent under the statute of Elizabeth.

[VAUGHAN WILLIAMS L.J. Must you not shew that the wife was a party to the fraud?—*Colombine* v. *Penhall.* (1)]

Here the terms of the settlement are such that fraud must be imputed: *Ex parte McBurnie's Trustees.* (2)

[VAUGHAN WILLIAMS L.J. I think there is no case in which a deed has been held void under the statute of Elizabeth when it was not shewn that the grantee was particeps criminis. And you must prove fraud at the date of the deed.]

This deed was a mere cloak to retain a benefit to the settlor. The deed must be deemed fraudulent as against him. It is for the other persons who benefit by the deed to prove good faith. Fraud must be imputed to any one who takes a benefit under this settlement. It is not necessary to prove that the wife conspired with her husband: *In re Pennington.* (3)

[*Horridge, K.C.*, referred to *Fraser* v. *Thompson.* (4)]

2. The liability under the covenant was a provable debt both under the Bankruptcy Act, 1869, and under the existing Act, and it was released by the bankruptcy of 1880 and the discharge of 1882: *Collyer* v. *Isaacs* (5); *Hardy* v. *Fothergill* (6); *Robinson* v. *Ommanney.* (7) A debt may be a provable debt although it may be void as against the trustee in bankruptcy: *Seaton* v. *Lord Deerhurst* (8); *Buckwell* v. *Norman.* (9)

3. The covenant is too vague and general to be capable of being enforced by the Court: *In re Clarke* (10); *In re Turcan.* (11)

The result is that the deeds of June 10 are merely voluntary, and are void under s. 47 of the Bankruptcy Act, 1847.

4. The deed of June 10 which relates to the furniture is void as against the trustee in bankruptcy under the Bills of Sale Acts as it was not registered as a bill of sale.

Horridge, K.C., in reply. The covenant in the settlement

(1) (1853) 1 Sm. & Giff. 228.
(2) (1852) 1 D. M. & G. 441.
(3) (1888) 5 Morr. 268.
(4) (1859) 1 Giff. 49.
(5) 19 Ch. D. 342.
(6) 13 App. Cas. 351.
(7) (1883) 23 Ch. D. 285.
(8) [1895] 1 Q. B. 853.
(9) [1898] 1 Q. B. 622.
(10) (1887) 36 Ch. D. 348.
(11) (1888) 40 Ch. D. 5.

of 1879 is not too vague or general to be enforced: *Tailby* v. *Official Receiver* (1); *Hardey* v. *Green* (2); *Lewis* v. *Madocks* (3); nor is it void under the statute of Elizabeth. *Ex parte Bolland* (4) is distinguishable from this case, because here the business assets are excepted from the operation of the covenant, and it is inconsistent with *Hardey* v. *Green* (2), and *Ex parte Games.* (5)

Further, the liability under the covenant was not provable under the bankruptcy. *Collyer* v. *Isaacs* (6) and *Robinson* v. *Ommanney* (7) merely decide that where the covenant is to secure the debt the covenant is released as well as the debt, and Jessel M.R. expressly guards himself against his decision being applied to the case of a covenant to settle after-acquired property in a marriage settlement.

Lastly, no argument can be based upon the Bills of Sale Acts, because the deeds of June 10 were a mere carrying out of the covenant in the marriage settlement, and are to be deemed to be part of the marriage settlement within the exception in s. 4 of the Act of 1878: *Wenmen* v. *Lyon & Co.* (8)

[The following cases were also referred to: *Lyon* v. *Weldon* (9); *Fawcett* v. *Fearne* (10); *Ex parte Attwater* (11); *Smith* v. *Topping* (12); *Ex parte Bishop* (13); *Mackay* v. *Douglas* (14); *In re Satterthwaite.* (15)]

Cur. adv. vult.

May 17. COZENS-HARDY L.J. This is an appeal from an order of Wright J. declaring certain deeds executed by the bankrupt in June, 1903, pursuant to a covenant contained in his marriage settlement of 1879, void under s. 47, sub-s. 2, of the Bankruptcy Act, 1883, as against the trustee, on the ground that he had "become bankrupt," i.e., had committed an act of

(1) (1888) 13 App. Cas. 523.
(2) (1849) 12 Beav. 182.
(3) (1803) 8 Ves. 150; (1810) 17 Ves. 48; 7 R. R. 10.
(4) L. R. 17 Eq. 115.
(5) 12 Ch. D. 314.
(6) 19 Ch. D. 342.
(7) 23 Ch. D. 285.
(8) [1891] 1 Q. B. 634; [1891] 2 Q. B. 192.
(9) (1824) 2 Bing. 334.
(10) (1844) 6 Q. B. 20.
(11) (1877) 5 Ch. D. 27.
(12) (1833) 5 B. & Ad. 674; 39 R. R. 616.
(13) (1873) L. R. 8 Ch. 718.
(14) (1872) L. R. 14 Eq. 106.
(15) (1895) 2 Man. 52.

C. A. 1904

REIS, *In re.* CLOUGH, *Ex parte.*

COZENS-HARDY L.J.

bankruptcy, on May 26. The act of bankruptcy relied on was that Mr. Reis on that day gave notice to his Stock Exchange creditors that he had suspended, or that he was about to suspend, payment of his debts: see s. 4 of sub-s. 1 (*h*).

Now the meaning of that sub-section has been fully explained by Vaughan Williams L.J. in two cases—*In re Scott* (1) and *Lord Hill's Trustee* v. *Rowlands*. (2) The result of the authorities is that a statement by a debtor that he is unable to pay his debts in full is not by itself an act of bankruptcy, although it may be such if it amounts to a statement that he intends to deal with his creditors as a body.

The transaction of May 26 does not, in my opinion, fall within this category. Mr. Reis and his solicitor gave each of his Stock Exchange creditors individually permission at once to close his account, which they could not have done without such permission. Each broker acted for himself—each brought an action for the balance due. I cannot regard this as falling within the sub-section. This was the only point on which Wright J. gave a decision, although various other points were argued before him upon which it was not necessary for him to express an opinion. But, as we are differing from the learned judge, the respondent has relied before us upon other grounds.

It is urged that the covenant by the husband in the marriage settlement of 1879 was, first, void under the statute of Elizabeth against creditors; secondly, so vague and general that the Court ought to decline to grant specific performance of it; and, thirdly, released by the bankruptcy of the husband in 1880, with the result that the deeds of June, 1903, were voluntary, and therefore void under s. 47, sub-s. 1.

In order to succeed upon the first contention—that is, that the covenant was void, under the statute of Elizabeth, against creditors—it is necessary to shew that the wife was party or privy to the fraud. Of this there is, and can be, no direct evidence. But it is urged that the deed itself to which she was a party is of such a nature that it cannot be deemed other than a fraudulent deed.

The decision of Chief Judge Bacon in *Ex parte Bolland*,

(1) [1896] 1 Q. B. 619. (2) [1896] 2 Q. B. 124.

In re Clint (1), undoubtedly supports this view. But in my opinion that decision is inconsistent with a line of authorities, of which *Hardey* v. *Green* (2) need alone be referred to. The judgment of Lord Langdale in that case seems to me to establish that such a covenant is not, on the face of it, fraudulent.

Then as to the next point, that the covenant is so vague and general that the Court ought to decline to grant specific performance of it, I think the husband's covenant is not too vague and general to be enforced. Lord Eldon in *Lewis* v. *Madocks* (3) held that such a covenant, on construction, must attach to and affect capital only, and not income, unless "laid up as capital," and that the Court ought to give effect to the covenant. *Hardey* v. *Green* (2) is to the same effect.

As to the third point, that the covenant was released by the bankruptcy of the husband in 1880, with the result that the deeds of June, 1903, were voluntary, and therefore void under s. 47, sub-s. 1, I think this objection cannot prevail. When once it has been decided that the covenant is one of which specific performance can be obtained, it follows that the right to specific performance is not barred by the bankruptcy. The covenant is not ancillary to a debt which was released by the bankruptcy; and there is no evidence of any breach of the covenant before the bankruptcy was closed.

There is nothing in *Hardy* v. *Fothergill* (4) which justifies the respondent's contention upon this point.

Lastly, an objection was taken to the assignment of the furniture on the ground that the deed was not registered as a bill of sale, and that the furniture remained in the apparent ownership of the bankrupt. The only act of bankruptcy which can be relied on was on June 25, and that is the date to which the title of the trustee relates.

Now a marriage settlement is not a bill of sale within the definition in the Bills of Sale Acts, and it is urged by Mr. Horridge that the furniture was bound in equity by the covenant in the marriage settlement of 1879, which did not

(1) L. R. 17 Eq. 115.
(2) 12 Beav. 182.
(3) 8 Ves. 150; 17 Ves. 48; 7 R. R. 10.
(4) 13 App. Cas. 351.

C. A. 1904

REIS, *In re.* CLOUGH, *Ex parte.*

Cozens-Hardy L.J.

require registration, and that the deed of June 10 was only for the purpose of completing the legal title by means of an actual transfer of the property. There has not been any transfer of the furniture by delivery to the trustees. They must rely upon the deed of June 10, 1903, as transferring the property to them.

The question arises whether that deed is a marriage settlement within the exception in s. 4 of the Bills of Sale Act, 1878, or is an absolute assignment of personal chattels within the meaning of s. 8 of the amending Act of 1882, which cannot be the foundation of a title as against the trustee in bankruptcy.

Now the deed of June 10 may, I think, be fairly regarded as forming part of the marriage settlement. It was executed in pursuance of a covenant in the deed of 1879, and was in the nature of a further assurance. A post-nuptial settlement executed in pursuance of an ante-nuptial deed falls within the term "marriage settlement" in the Bills of Sale Act. This is the conclusion at which I should have arrived apart from authority, and it accords with the view taken by the Court of Appeal in the case of *Courcier* v. *Bardili* (1), a note of which is found in the *Solicitors' Journal* for 1883, but which is not fully reported anywhere else.

The result is that in my opinion the appellants succeed both as to the freehold house and as to the chattels.

STIRLING L.J. The first question to be considered in this case is whether Mr. Reis committed an act of bankruptcy on May 26, 1903. Wright J. found that he did, the act being that he gave notice to his creditors, or some of them, that he was about to suspend payment of his debts, that being an act of bankruptcy under s. 4 of the Act of 1883, sub-s. 1 (*h*).

It is my misfortune to differ from the conclusion at which Wright J. arrived, and in that respect I only differ from him on the question of fact which he decided, and I do not quarrel with any of the law which he laid down in his judgment. In considering the meaning of the sub-section with which we have to deal particularly, namely, sub-s. (*h*), it has to be borne in

(1) (1883) 27 Sol. J. 276.

mind that by sub-s. (*f*) it is an act of bankruptcy if the debtor files in the Court a declaration of his inability to pay his debts. These two sub-sections were much considered by the House of Lords in the case of *Crook* v. *Morley*. (1) Lord Selborne in advising the House says: "It is undoubtedly possible, that there might be a document speaking of inability to pay a man's debts in such a context and in such a manner as not to imply 'that he had suspended, or that he was about to suspend, payment of his debts.' But on the other hand there might be a document of which the language might amount to 'a declaration of his inability to pay his debts,' which, taking it with all its circumstances and in its context, would practically, and according to the common sense of mankind, be a notice to his creditors that he had suspended, or was about to suspend, payment of his debts." In the same case Lord Watson says (2): "A declaration of his inability to pay his debts may be made by a debtor to one or more of his creditors, in terms and under circumstances which do not suggest that he means to stop payment of his debts as they fall due. But that such a declaration may be couched in language which clearly implies that the debtor means to pay nobody in full, and to place his assets at the disposal of his creditors, does not appear to me to be doubtful." The result is that in each case all the circumstances must be looked at; and we have to find, beyond a simple declaration of inability to pay, some evidence of an intention on the part of the debtor to suspend payment of his debts—that is to say, to abstain from paying his debts as they fall due, at least for a time.

[The Lord Justice stated the facts relating to the interview of May 26 substantially as above set out, and continued:—] In these circumstances I am unable to agree with Wright J. that the debtor did give notice to any of his creditors that he had suspended, or was about to suspend, payment of his debts. Certainly he did nothing which would indicate an intention on his part to place his assets entirely at the disposal of his creditors, or to preclude himself from dealing as he might think fit with others, with whom no communication appears to have

(1) [1891] A. C. 316, 320. (2) [1891] A. C. 324.

C. A. 1904

REIS, *In re.* CLOUGH, *Ex parte.*

Stirling L.J.

been made, nor, I think, with the Stock Exchange creditors Lumsden and Hart. For these reasons I am unable to agree with the conclusion of fact at which Wright J. arrived.

The next point which I have to consider is this, whether Mr. Reis was released from the covenant in his marriage settlement by the previous bankruptcy. The marriage settlement was executed on September 9, 1879. Mr. Reis became bankrupt in 1880, and he received his discharge in 1882. At that time, so far as appeared, Mr. Reis had not acquired any property within the covenant in the marriage settlement. There was no proof by the trustees of the settlement in the bankruptcy. But it is said that the liability of Mr. Reis under the covenant was provable in the bankruptcy, and consequently that the bankrupt was released from it by the order of discharge. At the time in question the Bankruptcy Act in force was that of 1869, the material sections of which are ss. 12, 31, and 49. The material provisions of these sections are incorporated in the present Act of 1883.

Now those sections were considered in two cases, namely, *Collyer* v. *Isaacs* (1), before the Court of Appeal, and *Hardy* v. *Fothergill* (2), in the House of Lords. In *Collyer* v. *Isaacs* (1) the case to be considered was one in which there was given as security for a debt an assignment of future chattels. The debtor became bankrupt, and after the bankruptcy and the order of discharge he acquired chattels which answered the description in the security; but the creditor did not prove this debt in the bankruptcy, and it was held that the security, so far as affected his future chattels, was discharged by the bankruptcy. It is obvious that that case was entirely different from the present case, in which we have to deal with a covenant in a marriage settlement for the settlement of after-acquired property. Sir George Jessel M.R. in giving his judgment carefully guards himself against saying that what was decided in that case would apply to the case of a marriage settlement containing a covenant to settle after-acquired property, for he says: "Without saying that that would apply to the case of a marriage settlement to settle after-acquired

(1) 19 Ch. D. 342. (2) 13 App. Cas. 351.

property, when you have a debt and a covenant to secure that debt in a particular way it would be a strange result if you could bar the debt and not the ancillary covenant."

In the case of *Hardy* v. *Fothergill* (1) the question again was of an entirely different nature, the question relating to the liability of the assignee of a lease for a term of years under a covenant to indemnify the lessees against breach of the covenant in the lease. In that case it was held that the claim of the lessees was barred under s. 49 of the Bankruptcy Act, 1869, the effect of s. 31 being to make the assignee's future and contingent liability on his covenant to indemnify a debt provable in the bankruptcy unless an order of Court declared it to be a liability incapable of being fairly estimated. In advising the House of Lords, Lord Selborne says this (2): "There may be contracts, such, for example, as a promise to marry (not broken), or a covenant not to molest, or not to carry on a particular trade within certain limits, &c.; which on a fair interpretation of these words ought to be excluded as having a different object from the payment of money in any contingency; although if they were broken a jury might award damages for their breach. I must guard myself against being supposed to lay down any rule applicable to cases of that kind, or to any others in which an injunction or specific performance would be the most proper remedy." These observations of Sir George Jessel and of Lord Selborne of course do not amount to decisions, but I think they afford guidance in the decision of the present case. In my judgment the covenant in the present case is one in which specific performance is the appropriate remedy, and it ought not to be held barred by the order of discharge in the first bankruptcy.

The next point to be considered is whether the covenant is too vague or too wide to be capable of specific performance in a Court of Equity. On this we have the guidance, as it appears to me, of clear authority. In the case of *Lewis* v. *Madocks* (3) there was a covenant in a marriage settlement on the part of the husband that he would "by deed or will convey,

(1) 13 App. Cas. 351. (2) 13 App. Cas. 360.
(3) 8 Ves. 150; 7 R. R. 10.

C. A. 1904

REIS, *In re.* CLOUGH, *Ex parte.*

Stirling L.J.

give, devise, and assure, all and singular his ready money, goods, chattels, and personal estate and effects, to and for the use and behoof of him, the said Richard Madocks, and Ann, his said intended wife, and the survivor of them for ever," upon certain trusts. Lord Eldon decreed specific performance of that contract after the death of the husband. The form of the judgment is stated at the end of the report (1), and it began with a declaration that the personal estate of which the husband was possessed during the coverture was liable under the contract. In a subsequent case, *Hardey* v. *Green* (2), Lord Langdale held that property coming to a husband after marriage was bound by a stipulation contained in articles executed previous to the marriage, "by which the husband and wife agreed, that all property, estate and effects to which the husband or wife might thereafter become entitled, should be settled to such uses as the wife should appoint; and in default, on trusts for the husband, wife and children." The decree gave specific performance of the stipulation in the articles.

These cases have never been overruled, and they form strong authority in favour of the proposition that the language of the covenant with which we have to deal in the present case is not too vague to be binding.

If anything more is required, I should desire to refer to the judgment of Bowen L.J. in *In re Clarke* (3), and the observations of Lord Macnaghten on that case in *Tailby* v. *Official Receiver*. (4)

But a further objection was made that the covenant was so wide that it would be wrong of the Court to enforce it on the ground that if fully carried into effect it would prevent the husband from paying his debts and deprive him of the means of subsistence. On that the observations of Cotton L.J. in the case of *In re Clarke* (5) and *In re Turcan* (6) were referred to.

Now to this objection there appears to me to be two answers:

(1) 8 Ves. 158; 7 R. R. 16.
(2) 12 Beav. 182.
(3) 36 Ch. D. 348, 355.
(4) 13 App. Cas. 523, 550, 551.
(5) 36 Ch. D. 352.
(6) 40 Ch. D. 5.

first, from the covenant in the marriage settlement in the present case the business assets of the husband are expressly excepted, and that appears to me to constitute a substantial exception. Secondly, if there were no such exception, it would still seem to me that the same case of *Lewis* v. *Madocks* (1) at a subsequent stage is an authority for holding that such a covenant is not to be construed so as to prevent the husband from paying his debts and maintaining his family. *Lewis* v. *Madocks* (1) came on for further consideration, and the decision of Lord Eldon at that stage is also reported. In the course of the argument (2) Lord Eldon said "he could not adopt the construction, that annual produce, for instance, dividends of stock, was property acquired during the coverture in the sense of this bond; except only to the extent, in which the husband himself might think proper to lay up that produce as capital: otherwise they would not be at liberty to spend a shilling: but in providing for their maintenance and comfort they could not go beyond income." For these reasons I think that effect ought not to be given to this objection.

Next it was urged that the covenant was void under the statute of Elizabeth. As a general rule, a marriage settlement cannot be set aside as a fraud on creditors of the husband unless evidence is given that the wife was party to the fraud: see *Kevan* v. *Crawford*. (3) No such evidence was adduced in the present case. It was said, however, that the wife must be taken to have known the terms of the settlement, and that those terms were, on the face of them, in the language of the Lords Justices in *Ex parte McBurnie's Trustees* (4), "grossly out of proportion to the station and circumstances of the husband," or "so extravagant as that they ought to awaken inquiry." I am unable to come to that conclusion. On this part of the case *Hardey* v. *Green* (5) is a direct authority. The case of *Ex parte Bolland* (6), which was much relied upon on behalf of the creditors, if rightly decided is distinguishable, for there the covenant extended to all after-acquired property of

(1) 17 Ves. 48; 7 R. R. 17.
(2) 17 Ves. 55; 7 R. R. 20.
(3) (1877) 6 Ch. D. 29.
(4) 1 D. M. & G. 441.
(5) 12 Beav. 182.
(6) L. R. 17 Eq. 115.

C. A. 1904

REIS, *In re.* CLOUGH, *Ex parte.*

Stirling L.J.

the husband, while here, as I have already pointed out, the business assets constitute an exception.

Lastly, it was urged that there had been no actual transfer pursuant to the contract before the commencement of the bankruptcy under s. 47, sub-s. 2, of the Bankruptcy Act, 1883. In the present case the bankrupt, in pursuance of the written notice served on him on May 23, 1903, by the trustees of the settlement, executed on June 10, 1903, before the commencement of the bankruptcy, two deeds, by one of which the house was conveyed to the trustees, and the other the furniture in that house was assigned to them, in both cases upon the trusts of the settlement. No question was raised as to the conveyance of the house being an actual transfer sufficient to prevent the operation of s. 47, sub-s. 2, of the Act of 1883. But it is contended that the assignment of the furniture is a bill of sale within the meaning of the Bills of Sale Act, 1878, and is void against the trustee in bankruptcy under s. 8 of the Amendment Act of 1882 by reason of its not having been registered in accordance with s. 10 of the Act of 1878. To this it is answered that by s. 4 of the Act of 1878 marriage settlements are excepted from the operation of the Bills of Sale Act, and that the assignment of June 10, 1903, is a marriage settlement within the meaning of the exception. I think that this is a valid answer to the objection. Unquestionably a wide meaning has been given to the expression "marriage settlement" in these Acts. Thus it was held in *Wenman* v. *Lyon* (1) by the Divisional Court and by the Court of Appeal that an agreement for a marriage settlement which provided for a subsequent assignment to trustees of certain property of the intended husband's was such a marriage settlement, and was effectual to protect the property against the trustee in the husband's bankruptcy, although the agreement was not registered and no assignment to the trustees was ever executed. In *Courcier* v. *Bardili* (2) it was also held by the Divisional Court and by the Court of Appeal that a post-nuptial assignment in pursuance of an ante-nuptial settlement was within the exception in the Act of 1878 and did not require registration.

(1) [1891] 1 Q. B. 634; [1891] 2 Q. B. 192. (2) 27 Sol. J. 276.

In my opinion the principle of these decisions applies. The assignment of June 10, 1903, was a marriage settlement within the exception in the Bills of Sale Act, 1878, and did not require registration, and the objection founded upon the want of registration appears to me to fail.

I think, therefore, the appeal ought to be allowed.

VAUGHAN WILLIAMS L.J. The judgments of Cozens-Hardy L.J. and Stirling L.J. have covered the whole ground. I therefore propose to add very little.

First, I propose to say, out of respect for Wright J., that I entirely agree in the view of Stirling L.J. that there is nothing in our judgment to-day which interferes with any proposition of law which was laid down by the learned judge. All that we are doing to-day is differing from Wright J. as to a conclusion in fact. Wright J. came to the conclusion that the solicitor who was acting on behalf of the bankrupt, Mr. Reis, was making a communication which was intended as a communication having reference to all his creditors—a communication that he intended to suspend payment—a communication of such a character that the bankrupt would have been guilty of a breach of faith if, after making that communication, he had made an arrangement with any particular creditor for the discharge of his debt. I have come to a different conclusion in fact. I have come to the conclusion that all that the solicitor was doing on behalf of the bankrupt, when he made the communication to Messrs. Lumsden & Hart, was to negotiate with particular creditors as regards their particular debts. Upon that point I have no more to say.

I propose now to say a few words as to two of the many points which were raised in this case; but before I do so I should like to say at once a word in respect of the case of *Ex parte Bolland*. (1) That case I can say of my own personal knowledge and experience as a bankruptcy judge is a case which has been frequently dealt with, and I think that hereafter it ought not to be treated as a standing authority. I am well aware that there is this distinction, that the property

(1) L. R. 17 Eq. 115.

C. A. 1904

REIS, *In re.* CLOUGH, *Ex parte.*

Vaughan Williams L.J.

covered in that case was much wider than in the present case, and that one might decide the present case upon that distinction without impugning the authority of *Ex parte Bolland*. (1) But, speaking for myself, I prefer to say that I do not think that *Ex parte Bolland* (1) ought any longer to be regarded as a standing authority.

Having said that, there are two points upon which I mean to say a few words. First, the point as to the effect upon the marriage settlement of the prior bankruptcy; and, secondly, the point of the necessity for registration of the formal instrument of assignment which followed the original marriage settlement.

Now with regard to the first of these points, the suggestion made is this: that the effect of the first bankruptcy in 1880 was to relieve Mr. Reis, the bankrupt, for ever from the obligations in the marriage settlement and the covenant. Of course, if that were so, the result would be that there would be no instrument in the field of operation under which it could be said that, as the husband from time to time acquired property other than his business assets, such property would in equity pass to the trustees of this marriage settlement. I really should not have mentioned this point, seeing that I entirely agree with the observations that have been made by my brethren about it, if it were not for the fact that this is a new point as to which there is no positive authority. There is the passage in the judgment of Sir George Jessel in *Collyer* v. *Isaacs* (2), and there is also the passage in the judgment of Lord Selborne in *Hardy* v. *Fothergill*. (3) I do not propose to go into those two passages in detail: they have been read; it is sufficient to say of those passages that they certainly shew that neither of those learned judges was then prepared to affirm the proposition that the bankruptcy and discharge of the husband, after a marriage settlement like this, would discharge him from all obligations thereunder. But I do propose to read two or three words from the same passage to which Stirling L.J. referred in the advice given by Lord Selborne to

(1) L. R. 17 Eq. 115. (2) 19 Ch. D. 342.
(3) 13 App. Cas. 351.

the House of Lords. (1) [The Lord Justice read from the speech of Lord Selborne the definition of "liability" contained in s. 31 of the Bankruptcy Act, 1869 (2), which is incorporated in s. 37 of the Act of 1883, and also the passage already quoted by Stirling L.J., and continued:—]

It will be observed that amongst those contracts which Lord Selborne suggests might, upon a fair reading of the construction of the definition which I have read from the Act of Parliament, be excluded from it, there are not only negative covenants, but there is, in one example certainly, a positive contract, as a promise to marry not broken. In concurring, as I do, entirely with the judgments of my brethren upon this point, I wish to say shortly that the ground upon which I concur is that in my judgment the marriage settlement does not fall within this definition of liability. It is a contract which has been made with a different object from the payment of money in any contingency. I wish to add, by way of caution, that no amount of difficulty in the estimate of the value would justify the exclusion in this Court of a proof of debt, because, in my judgment, the plain words of the statute shew that if once the debt or liability, as the case may be, is shewn to come within the definition, the only Court which can exclude that debt from the operation of bankruptcy and its consequent discharge in freeing the debtor is the Court of

(1) 13 App. Cas. 360.

(2) Sect. 31 of the Bankruptcy Act, 1869, after providing, subject to certain exceptions, that "all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication shall be deemed debts provable in bankruptcy," defines the word "liability" as follows: "'Liability' shall for the purposes of this Act include any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, or is or is not likely to occur or capable of occurring before the close of the bankruptcy, and generally it shall include any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of money or money's worth, whether such payment be, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion."

C. A. 1904

REIS. *In re.* CLOUGH, *Ex parte.*

Vaughan Williams L.J.

Bankruptcy, and the Court of Bankruptcy dealing with the particular bankruptcy which has occurred.

The only other matter to which I propose to refer is as to the necessity for the registration of the instrument which was executed in pursuance of the marriage settlement of 1879. It was said that the goods and chattels the subject of the settlement of 1879 were not the property of the trustees of the marriage settlement as against the trustee in bankruptcy, because the title of the trustees of the settlement depends upon the deed of transfer of June 10, 1903, and that that deed is void as a bill of sale for want of registration, or is void as falling within the operation of sub-s. 2 of s. 47 of the Act of 1883. I may say at once in passing that no point really arises under sub-s. 2 of s. 47, because inasmuch as under our decision the commencement of the bankruptcy is not until the end of the month of June, the terms of the section however strictly construed are fully complied with by the execution of the instruments of June 10. I think that this point under the Bills of Sale Act fails. The question of the necessity for registration depends upon s. 4 of the Bills of Sale Act, 1878, which excepts a marriage settlement from the definition of bills of sale. By the very terms of that section "bill of sale" includes not only assignments but also any agreement, whether intended or not to be followed by the execution of any other instrument by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred. It is plain therefore that the ante-nuptial document would have required registration but for the exception, and that, notwithstanding that the document was intended to be followed by the execution of another instrument; but the exception exempts this document as being a marriage settlement from the necessity to register, and I think there is nothing in the Bills of Sale Act which takes away the equitable right conferred by such a marriage agreement, if in fact it is followed in pursuance of its terms by an assurance or transfer which is not registered.

The case of *Wenman* v. *Lyon & Co.* (1), decided by Pollock B. and Charles J., which was affirmed on appeal, makes it clear

(1) [1891] 1 Q. B. 634; [1891] 2 Q. B. 192.

that the words "marriage settlement" include a memorandum of a marriage settlement which conveyed equitable rights only, and would include marriage articles intended to be followed by a formal marriage settlement.

It seems to me impossible that the non-registration of an instrument intended to give legal effect to a prior instrument which had, by virtue of the exception in favour of marriage settlements, already created valid equitable rights, could avoid or extinguish those rights. A marriage contract might be so drawn that it would manifest an intention that no property should pass unless and until a further instrument of transfer was executed. Such a contract would create a power to seize something in the nature of a floating security, and would, I think, undoubtedly be a bill of sale, and I am inclined to think a marriage settlement; but I do not think that the present marriage contract is such an instrument. The material words are: [The Lord Justice read the covenant, and continued:—] I do not think that according to these words the execution of a transfer or the taking possession by the trustees is a condition precedent to the passing of the property. This being so, it follows, in my judgment, that the bill of sale point fails. The settlement of 1879 did not require registration, and the equitable rights arising under that settlement as the subject-matter of it from time to time has come into existence are not avoided by the non-registration of the instruments of transfer of June, 1903.

The result is that the appeal must be allowed, with costs.

Appeal allowed.

Solicitors: *Nordon & De Freece; W. H. Martin & Co.*

H. B. H.

1904
May 4.

TINWELL, Appellant; MAYHOOK, Respondent.

Revenue—Excise Acts—Dealer in Spirits—Licence—Duty—Sale of Spirits out of Bond for Ship's Stores—Excise Licences Act, 1825 (6 *Geo.* 4, *c.* 81), *s.* 2.

A ship's stores merchant, who sells spirits out of bond to foreign-going vessels as ship's stores, is a "dealer in spirits" within the meaning of s. 2 of 6 Geo. 4, c. 81, and must, therefore, for that purpose take out the excise licence required by that statute.

Case stated, under the Summary Jurisdiction Acts, by three justices of the peace of the county of Northumberland.

An information was preferred before the justices at petty sessions by the respondent, an officer of Inland Revenue, charging the appellant with having dealt in and sold certain spirits, to wit, twelve reputed quart bottles of spirits, without having in force such a licence as by the statute in that behalf was and is required. (1)

(1) The statute 6 Geo. 4, c. 81, after reciting that "it is expedient to repeal the several duties and sums of money payable for or upon certain excise licences in Great Britain and Ireland respectively and to impose other duties," provides, by s. 2: "In lieu and instead of the duties by this Act repealed, there shall be raised, levied, collected and paid, in and throughout the United Kingdom, the several duties of excise, or rates and sums of money hereinafter following (that is to say,):

"For and upon every excise licence to be taken out by any dealer or person hereinafter mentioned, within Great Britain and Ireland, to be paid by such dealer and person respectively, the respective annual sum or duty of excise hereinafter mentioned; (that is to say,):

"Every dealer in spirits, not being a retailer thereof—£10 : 0 : 0."

Sect. 12 enacts, "that it shall not be necessary for any person or persons to take out an excise licence for the sale of any foreign goods or commodities, for the sale of which in any manner an excise licence is required by this Act, whilst such goods or commodities shall be and remain in the warehouse or warehouses in which the same shall have been deposited, lodged or secured according to law, before payment of duty upon the importation thereof; anything in this or any other Act to the contrary thereof in anywise notwithstanding: Provided always that every such sale shall be of not less than one entire cask or package of the liquors or goods so warehoused, and be made to one person or to persons carrying on trade or business in partnership."

Sect. 26 makes liable to a penalty any person who shall deal in spirits, not being a retailer thereof, without taking out such licence as is in that

1904

TINWELL v. MAYHOOK.

At the hearing of the information the following material facts were proved or admitted by the parties:—

The appellant was a ship's stores merchant carrying on business at his office and warehouse in Blyth, in the county of Northumberland. In this warehouse he kept such of his stock as consisted of ship's stores upon which no excise duties are payable.

With respect to stores on which duty was payable, he was a renter of a Customs bond at Blyth, and in this bond he kept, amongst other dutiable articles, a quantity of spirits. None of these spirits or dutiable articles could be taken out of this bond except under the formalities prescribed by the Custom House officials and in the presence of an officer of Customs.

In September, 1903, the captain of a foreign vessel called the *Amor* ordered a quantity of stores for his vessel from the appellant in the usual course of business. The order included twelve bottles of spirits. The appellant followed the usual procedure to obtain these spirits from the bond, the procedure being as follows: A document called a "stores authority" was filled up and signed by the captain. This is a request from the captain to the appellant to draw the spirits from his bonded warehouse, and the signature of the captain is attested on the back by the appellant's representative. This document was taken to the Custom House, and in pursuance of the request the bond was opened by the Customs officials, and in the presence of a Customs officer the spirits were taken out of bond and permission given to the appellant to remove them by licensed cart to the ship. On the arrival of the spirits at the ship the receipt of them was attested by another Customs official then on board, and the goods sealed up by him. This seal is not broken until the vessel is at sea outside territorial waters.

[In addition to the "stores authority" mentioned above, two other documents were appended to and made part of

behalf required; and by s. 104 of the Spirits Act, 1880 (43 & 44 Vict. c. 24), "the sale of spirits in any quantity less than two gallons or less than one dozen reputed quart bottles shall be deemed sale by retail."

1904

TINWELL v. MAYHOOK.

the case—namely, a warrant authorizing the removal of the goods to the ship by licensed cart, signed by the person authorized to remove them and countersigned by various Customs officials, and a "shipping bill" containing particulars of the goods shipped, which must be produced to the officer of Customs and identified on shipment, signed by the master of the ship and countersigned by an officer of Customs.]

No stock of spirits or dutiable goods was kept in the appellant's private warehouse, or at any other place than the Customs bond, and the appellant neither sold nor disposed of any spirits for consumption in the United Kingdom, but only supplied the same to foreign-going vessels. On spirits supplied to such vessels no duties are payable to the Inland Revenue.

The justices, being of opinion that the appellant had dealt in spirits within the meaning of the statute 6 Geo. 4, c. 81, without having the required licence, convicted him of that offence, and inflicted a fine upon him.

The question for the opinion of the Court was whether they were right in their determination that the appellant had dealt in spirits without a licence.

If the Court were of opinion that the justices' decision was right, the conviction to stand; if otherwise, to be quashed.

J. B. Williamson, for the appellant. The appellant was not a "dealer in spirits" within the meaning of the Excise Licence Act of 1825 (6 Geo. 4, c. 81), and the conviction was, therefore, wrong. In order to decide what is meant by the phrase "dealer in spirits" the whole scheme of the Excise Acts must be looked at. It was not intended by the Legislature that a dealer's licence should be necessary where spirits not subject to any custom or excise duty in this country are sold out of bond for ship's stores. The intention was to render a dealer's licence necessary where spirits are sold for consumption or to be delivered in this country and are dutiable here; in other words, the provisions of the Act are aimed at persons who deal in excisable commodities. Sect. 12 (1) does not conflict with this view; it is meant to meet the case where

(1) Ante, n. (1), p. 790.

foreign goods which are eventually going to be brought into this country and consumed here are being bought and sold for that purpose only, and it provides, with respect to sales and purchases taking place whilst the goods are in a bonded warehouse, that persons may sell them without a dealer's licence before the duty is payable. Sect. 12 may have been inserted in order to make it clear that the transactions it refers to, which otherwise might have been thought to be within the Act, were not within it. It is clear that, under the various Acts affecting the matter, customs duty is not payable in respect of spirits sold out of bond to ships, and excise duty is only payable in respect of spirits distilled in this country and used for inland consumption. The Excise Act of 1784 (24 Geo. 3, c. 41) was in force when the Act of 1825 now in question was passed, and the title of the earlier Act is, "An Act for laying certain duties upon licences to be taken out by the makers of and dealers in excisable commodities therein mentioned," shewing the intention of the Legislature that dealers in excisable commodities only should be subject to that duty.

[WILLS J. Spirits imported from abroad would not be "excisable," though they would be subject to customs duty. Surely the title of that Act does not help your argument, because you cannot contend that the 6 Geo. 4, c. 81, did not make an excise licence necessary in the case of persons importing spirits from abroad and selling them, not for export, in this country.]

The title is one of many indications that the Excise Acts are meant to deal with commodities subject to duty in this country. There is no definition of "dealer" in the Act of 1825, but dealers are referred to both in 6 Geo. 1, c. 21, and in 6 Geo. 4, c. 80, as persons having a certain quantity of spirits in their custody. Sect. 10 of 6 Geo. 4, c. 81, provides that no one licence shall authorize any person (with certain exceptions) to carry on his trade in more than one separate set of premises. The Spirits Act, 1880 (43 & 44 Vict. c. 24), also does not give any definition of a "dealer in spirits," but it contains an elaborate series of provisions with respect to

1904

TINWELL v. MAYHOOK.

dealers. For instance, they must have a permit book, a stock book, and a certificate book; they are not allowed to move spirits from place to place without the leave of the Inland Revenue authorities; they must make an entry in writing of the premises used for keeping spirits, and their premises are subject to be entered, surveyed, and examined from time to time by the officers of the Inland Revenue. None of those provisions could apply to a case like the present, where the spirits sold are never in the possession or custody or on the premises of the person who sells them. The documents appended to the case are all Customs documents made under s. 126 of the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), which deals specially with the case of goods sold out of bond for ship's stores. Until the goods are put on board the ship they are always in the custody and under the supervision of the Custom House officials, and must be treated as never having come into this country for any purpose of the Excise Acts.

[KENNEDY J. The object is to prevent persons improperly escaping payment of duty.]

That is so; but those statutory precautions mark the difference between the sale in the present case and a sale by a dealer in spirits in the ordinary sense.

Sir Edward Carson, S.-G. (*S. A. T. Rowlatt* with him), for the respondent. The argument for the appellant confuses two things—the payment of duty upon these bonded articles themselves and the duty payable by a person who deals in them. When those two things are kept distinct the matter becomes quite clear. Sect. 12 of 6 Geo. 4, c. 81, is conclusive, because its provisions would have been unnecessary if the contention for the appellant were well founded. Sect. 5 of 23 & 24 Vict. c. 113 makes the matter still clearer. It provides that s. 12 of the earlier Act "shall not extend to exempt from liability to take out an excise licence for the sale of foreign wine or spirits any person who shall sell at any time any quantity less than 100 gallons respectively"; and 30 & 31 Vict. c. 90, s. 17, enacts that, if a person solicits an order for spirits or other articles for the dealing in which an excise licence

is by law required, he shall forfeit the penalty imposed upon persons selling such articles without having a dealer's licence; provided that nothing contained therein shall be deemed to apply to the sale of any spirits or foreign wine while the same shall be and remain in the warehouse or warehouses in which the same shall have been deposited, lodged, or secured according to law, before payment of duty upon the importation thereof, where such spirits shall be sold in a quantity not less than 100 gallons at one time. It is clear, therefore, that s. 12, as amended, treats a sale out of bond for export of a quantity less than 100 gallons as an ordinary sale for which a dealer's licence is required.

[He was stopped by the Court.]

LORD ALVERSTONE C.J. I am of opinion that the justices' decision in this case was right. The appellant carries on the business of a ship's stores merchant, and sells spirits to persons who wish to buy stores from him. It is said that in this particular transaction he ought not to be regarded as a dealer in spirits, because the spirits which he sold to the captain of the ship came out of bond, and were taken to the ship under the protective regulations made under the Customs Consolidation Act, 1876. In my view, however, that code of regulations was provided simply for the purpose of protecting the revenue against goods being taken out of bond, and getting surreptitiously into such a state of circumstances that customs duty ought to be paid in respect of them; it is not conclusive, and does not help us to decide the question whether or not the appellant was a dealer requiring an excise licence for the sale of spirits in this case. The statute 6 Geo. 4, c. 81, imposes upon every dealer in spirits the obligation to take out a licence, and it is true that with regard to dealers in spirits in the ordinary sense there are the statutory provisions to which our attention was called with respect to keeping books, &c., and securing that the trade shall be carried on so as to be subject to the supervision of the officers of excise. But those precautions in the case of an ordinary dealer in spirits, or a person who has spirits for the purposes

1904

TINWELL v. MAYBOOK.

Lord Alverstone C.J.

of sale on his premises, do no more than afford some evidence of what the Legislature thought was necessary for supervising that kind of trade, and we have, therefore, to see whether there is anything in this Act which excludes from the meaning of the words "a dealer in spirits" a person who does in fact deal in spirits in bond by selling them for export whilst they are in bond. I ought to say here that, although no form of the certificate or excise licence is given in the Act, the particulars which the certificate must state are given in s. 7. It must give the true name and place of abode of the person taking out the licence, the true date or time of granting it, and the place at which the trade or business for which it is granted shall be carried on. The licence, therefore, need not contain any particulars or details with respect to the character of the warehouse in which the goods intended to be sold are, or matters of that kind; it need only identify the person carrying on the business and indicate the place at which he is going to carry it on. That being the nature of the certificate or licence, when s. 12, as amended subsequently, is considered, I do not think there is any doubt in this case. It is clear that s. 12 contemplated that the sale of spirits in bond might require the person who sold them to have a licence, because that section says: "It shall not be necessary for any person or persons to take out an excise licence for sale of foreign goods and commodities for the sale of which in any manner an excise licence is required by this Act." That cannot refer to dutiable articles only; and the next sentence makes it obvious that those words refer to foreign goods and commodities which would become the subject of duty if they were sold in, or imported into, this country, because it runs: "whilst such goods and commodities shall be and remain in the warehouse or warehouses in which the same shall have been deposited, lodged or secured according to law before payment of duty upon the importation thereof." Counsel for the appellant suggested that s. 12 only meant that, as there might be a sale before the payment of duty, it was not necessary to take out a dealer's licence before the duty was paid. I do not think that is what the section meant. The words "before the payment of duty"

are used to describe the goods as having been deposited in a bonded warehouse upon importation. The section does not make all sales of that character sales in respect of which no licence need be taken out, but it has this important proviso: "provided always that every such sale shall not be of less than one entire cask"; and the Act of 1860 (23 & 24 Vict. c. 113), s. 5, in referring to that section speaks of it as enacting "that it shall not be necessary for any person or persons to take out an excise licence for the sale of any foreign goods or commodities for the sale of which in any manner an excise licence is required by this Act whilst such goods and commodities shall be and remain in the warehouse." The language of s. 12 of the Act of 1825 is repeated, and the enactment goes on to say that it shall not extend to exempt from liability to take out an excise licence for the sale of foreign wines or spirits any person who shall sell at any one time any quantity less than 100 gallons. To my mind, therefore, both sections contemplate that the Act of 1825 would have included all sales, but limit, first a smaller, and then a larger quantity, as not being sales for which a licence is required. We pressed counsel for the appellant to say why, if his contention that a licence was only required when there was a sale of goods on which excise duty would have to be paid, s. 12 was wanted. He answered that it was inserted for the purpose of making clear that a transaction which might otherwise be thought to come under the Act did not come under it. That is an ingenious answer, but it does not seem to me consistent with the proviso. It would have been so easy to avoid all doubt by providing that people selling foreign wines or spirits out of bond for export should not be considered "dealers" therein within the meaning of the Act, but s. 12, as amended, only exempts persons with respect to certain kinds of sales from the necessity of taking out the licence under the earlier section of the Act.

I am of opinion, therefore, that the appellant is dealing in spirits within the meaning of the Act, and that he must carry on his business of selling spirits to ships as ships' stores by being a licensed and not an unlicensed dealer. I think the conviction was right, and should be affirmed.

1904

TINWELL v. MAYHOOK.

WILLS J. I am of the same opinion, and have nothing to add to my Lord's judgment.

KENNEDY J. I concur.

Judgment for the respondent.

Solicitors for appellant: *Ince, Colt & Ince, for W. Charlton, Blyth.*

Solicitor for respondent: *The Solicitor of Inland Revenue.*

W. A.

1904

July 8.

BROOKS, APPELLANT *v.* BAGSHAW, RESPONDENT.

Adulteration—Food and Drugs—Institution of Prosecution—Withdrawal of Summons—Issue of Second Summons—Sale of Food and Drugs Act, 1899 (62 & 63 *Vict. c.* 51), *s.* 19, *sub-s.* 1.

By s. 19, sub-s. 1, of the Sale of Food and Drugs Act, 1899, a prosecution under the Sale of Food and Drugs Acts "shall not be instituted" after the expiration of twenty-eight days from the time of purchase.

An information was laid and a summons issued thereon within the twenty-eight days, but, the summons not having been served within the time prescribed by s. 19, sub-s. 2, of the Act, it was allowed to drop, and, after the expiration of the twenty-eight days, a fresh summons was applied for on the same information and issued:—

Held, that there having been no adjudication on the merits of the first summons, a second summons could be issued on the information; and that it was immaterial that the second summons was issued after the expiration of the twenty-eight days, the information, which was the institution of the prosecution, having been laid within that time.

CASE stated by two justices in and for the city and county of the city of Norwich.

The facts were as follows: At a petty sessions held at Norwich on March 3, 1904, an information was preferred by the appellant, an inspector under the Sale of Foods and Drugs Acts, against the respondent, for that the respondent, on January 9, 1904, did unlawfully sell to the prejudice of the purchaser a quantity of milk which was not of the nature, substance, and quality of the article demanded by the purchaser, contrary to the Sale of Food and Drugs Acts.

A preliminary objection to the jurisdiction of the justices to hear and determine the case was taken by the respondent on the ground that the prosecution was out of time, as not having been instituted before the expiration of twenty-eight days from the time of the purchase as required by s. 19, sub-s. 1, of the Sale of Food and Drugs Act, 1899. (1)

The information had been laid on January 23, 1904, before one of the justices for the city of Norwich, who on the same day issued his summons addressed to the respondent and made returnable on February 11, 1904. This summons should have been served not later than January 27, so as to comply with s. 19, sub-s. 2, of the Act. The summons was however, by the default of the county police, not served until January 29, leaving only twelve clear days between the service and the return day of the summons.

By reason of this defective service the case was not proceeded with on the return day, February 11; but on that day, on the application of the appellant, a fresh summons, dated February 11 and returnable on March 3, was issued by the same justice who had issued the first summons. This summons was intended to be issued, and was really issued, upon the information of January 23, but through a clerical error the summons purported to have been issued upon an information "laid this day," i.e., February 11, although in fact no fresh information had been laid on that date.

The respondent, appearing in answer to the second summons, contended—(1.) that the prosecution had not been instituted before the expiration of twenty-eight days from the time of purchase, as required by s. 19, sub-s. 1, of the Act of 1899, inasmuch as the second summons had been issued, as appeared by it, on a second information laid on February 11; and (2.), should this

(1) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 19: "(1.) When any article of food or drug has been purchased from any person for test purposes, any prosecution under the Sale of Food and Drugs Acts in respect of the sale thereof, notwithstanding anything contained in s. 20 of the Sale of Food and Drugs Act, 1875, shall not be instituted after the expiration of twenty-eight days from the time of purchase.

"(2.) In any prosecution under the Sale of Food and Drugs Acts the summons shall not be made returnable in less time than fourteen days from the day on which it is served."

1904

BROOKS v. BAGSHAW.

contention fail, that the laying of the information alone was not the institution of a prosecution under s. 19 of the Act of 1899, but that what was required by s. 19 was, not only the laying of the information, but also the service of the summons within the twenty-eight days.

It was contended on behalf of the appellant—(1.) that the clerical error in the second summons did not vitiate it, inasmuch as there had not been any fresh information in writing or otherwise, and that the summons could be amended in that particular; (2.) that the laying of the information on January 23 was a sufficient institution of the proceedings within the meaning of the Act, and that the summons issued upon that information need not have necessarily been served within the twenty-eight days' limit.

The justices were of opinion that the respondent had not been misled or deceived by the clerical error in the second summons as to the date of the information, and did not give effect to the respondent's contention with regard to that; but the justices were of opinion that it was imperative to serve the summons as well as to lay the information within the twenty-eight days, and on this ground they dismissed the information.

The question for the opinion of the Court was whether the justices came to a correct decision in point of law.

E. E. Wild, for the appellant. The laying of the information, and not the service of the summons, is the institution of the prosecution: *Beardsley* v. *Giddings* (1); *Thorpe* v. *Priestnall.* (2)

[LORD ALVERSTONE C.J. We wish to hear you on the question as to whether the second summons was rightly issued on the original information.]

Where a summons has been dismissed or withdrawn, not on its merits, but by reason of the discovery of some informality or technical error in the proceedings, then there is no need to lay a fresh information, for a second summons can be issued on the original information: *Ex parte Fielding* (3); *Reg.* v.

(1) [1904] 1 K. B. 847. (2) [1897] 1 Q. B. 159.
(3) (1861) 25 J. P. 759.

Justices of Lancashire. (1) The information in this case was laid within twenty-eight days from the time of purchase; there was no adjudication on the merits of the first summons —it was simply allowed to drop on account of the defective service; a second summons could, therefore, be issued, and the justices were wrong in dismissing the information. [He also referred to *Morris* v. *Duncan* (2); *Dixon* v. *Wells* (3); *Batt* v. *Mattinson* (4); *Pickavance* v. *Pickavance* (5); *Simcox* v. *Handsworth Local Board.* (6)]

The respondent did not appear.

LORD ALVERSTONE C.J. The question raised in this case is not exactly covered by the decision in *Beardsley* v. *Giddings* (7), the point being whether, where an information is laid under the Sale of Food and Drugs Acts within twenty-eight days of the commission of the offence, it is a valid objection to the proceedings that the summons was issued after the expiration of the twenty-eight days. In *Beardsley* v. *Giddings* (7) it so happened that the information was laid and the summons was issued on the same day, but the summons was not served until after the twenty-eight days had expired. We held that the laying of the information, and not the service of the summons, was the institution of the prosecution, and that the proceedings were, therefore, in time. Wills J. in that case said (8): "The institution of a prosecution seems to me to mean ordinarily the commencement of the proceedings by which a person is brought before the Court"; I think that he there correctly stated the principle. Ever since the decision in *Ex parte Fielding* (9) it has been held that on a valid information two or more summonses in succession can be issued unless and until there has been a determination of the matter on its merits. In *Ex parte Fielding* (9) Cockburn C.J. pointed out that, "The justices entertained the application in due time, and therefore issued a summons. That summons, however, from

(1) (1874) 38 J. P. 215.
(2) [1899] 1 Q. B. 4.
(3) (1890) 25 Q. B. D. 249.
(4) (1900) 82 L. T. 800.
(5) [1901] P. 60.
(6) (1881) 8 Q. B. D. 39.
(7) [1904] 1 K. B. 847.
(8) [1904] 1 K. B. at p. 851.
(9) 25 J. P. 759.

1904

BROOKS v. BAGSHAW.

Lord Alverstone C.J.

some cause or other, was not served, and dropped. Why should the same justice not issue another summons, or a series of summonses, if necessary, on the same information?" I think, therefore, that, as the information in the present case was laid within the proper time, the issue of the second summons was in the circumstances perfectly valid, and the justices ought not to have refused to entertain the case. The appeal will be allowed.

KENNEDY and PHILLIMORE JJ. concurred.

Appeal allowed.

Solicitors for appellant: *Sharpe, Parker, Pritchards, Barham & Lawford, for A. H. Miller, Town Clerk, Norwich.*

F. O. R.

1904
Aug. 1, 2.

HAMPSTEAD CORPORATION *v.* MIDLAND RAILWAY COMPANY.

Metropolis Management Acts—New Street—Paving Expenses—Land abutting on Street—"Owner"—Restrictions imposed by Special Act—Metropolis Management Acts, 1855 (18 & 19 *Vict. c.* 120), *ss.* 105, 250, *and* 1862 (25 & 26 *Vict. c.* 102), *s.* 77.

By the provisions of a private Act, inserted for the protection of a landowner, a railway company were bound to acquire all his land adjoining a certain street, and to leave a strip of land along the whole length of the street, and to plant the strip with trees and shrubs and fence it off from the street, and to maintain it in that condition. The company acquired the land, and planted and fenced a strip along and contiguous to the whole length of the street:—

Held, that the railway company were the "owners" of the strip of land within s. 250 of the Metropolis Management Act, 1855, and therefore were liable to contribute to the expense of paving the street as a new street.

SPECIAL CASE stated in an action.

This action was brought to recover the sum of 1200*l.*, an apportioned amount of the expenses of paving Westbere Road, a new street in the metropolis, from the defendants as the "owners" of land abutting on the new street, within the

meaning of s. 250 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120). (1)

By the Midland Railway Act, 1900 (63 & 64 Vict. c. cxliii.), which conferred certain additional powers on the defendant company, it was provided as follows: "Sect. 18. The following provisions shall, unless otherwise agreed, apply and have effect for the protection of P. H. G. Powell-Cotton and his trustees (in this section called the 'owners')—(1.) The company shall not use any part of the sidings to be placed upon the land to be acquired from the owners for any purpose except for the standing of empty passenger trains. (2.) The company shall acquire all the land of the owners up to Westbere Road, and shall leave a strip of land 20 feet wide along the whole length of such Westbere Road, and shall at their own expense plant and maintain the same with shrubs and trees to the reasonable satisfaction of the owners, and shall at the like expense and to the like satisfaction fence off the said lands from the Westbere Road by an open unclimbable iron fence 7 feet high, such planting and fencing to be carried out within one year from the company obtaining possession of such lands and to be maintained by the company."

The company acquired all the said land, and left a strip

(1) Sect. 105 of the Metropolis Management Act, 1855, provides that if the owners of the houses forming the greater part of any new street which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved then such vestry or district board shall well and sufficiently pave the same as therein mentioned, and the "owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement."

By s. 250, "the word 'owner' shall mean the person for the time being receiving the rack-rent of the lands or premises in connection with which the said word is used, whether on his own account, or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent."

By s. 77 of the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102), where any vestry or district board shall, under the powers given by s. 105 of the Metropolis Management Act, 1855, have paved, or be about to pave, any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein.

1904

HAMPSTEAD CORPORATION v. MIDLAND RAILWAY.

20 feet wide along and contiguous to the whole of the west side of Westbere Road, which they fenced and planted as prescribed by the above Act.

Westbere Road was, in 1903, paved by the plaintiffs as a new street, and the sum of 1200*l.* was apportioned upon the company as the owners of the above strip of land. The company refused to pay, upon the ground that they were not "owners" within the meaning of the Metropolis Management Acts; and this action was thereupon brought.

Macmorran, K.C., and *Courthope Munroe*, for the plaintiffs. The defendants contend that they are not "owners" of this land, within the meaning of s. 250 of the Act of 1855, because the land has by statutory restrictions been made incapable of yielding a rack-rent. All the authorities upon this question were referred to and reviewed in the Court of Appeal in *London County Council* v. *Wandsworth Borough Council*. (1) The result of the decisions is that, if land is so dedicated to public purposes, or so restricted by a public statute, that it is placed "extra commercium" and prevented from being let at a rack-rent, then the person in whom it is vested is not the "owner" within s. 250; but that, when the restriction only arises by reason of a private contract or trust, the land is not placed "extra commercium," as was the case in *Wright* v. *Ingle* (2) and *Hornsey District Council* v. *Smith*. (3) In this case the restrictions upon the land are under a section of a private Act which is no more than a bargain between the parties, no public rights being created. Those restrictions can at any time be waived or released by agreement between the parties: *Goldsmid* v. *Great Eastern Ry. Co.* (4); *Savin* v. *Hoylake Ry. Co.* (5); *Rothes* v. *Kirkcaldy Waterworks Commissioners*. (6)

Montague Lush, K.C., and *W. Wills*, for the defendants. The liability to contribute to the expenses of paving a new street is intended to be thrown upon the owners of the pro-

(1) [1903] 1 K. B. 797.
(2) (1885) 16 Q. B. D. 379.
(3) [1897] 1 Ch. 843.
(4) (1883) 25 Ch. D. 511.
(5) (1865) L. R. 1 Ex. 9.
(6) (1882) 7 App. Cas. 694.

perty which thereby receives a benefit—that is, the owners of houses, or of land upon which houses may be built: *Plumstead Board of Works* v. *British Land Co.* (1) Here there are restrictions upon the land by which it is struck with sterility and cannot be built upon; and it has no access to the street. This case is quite different from *Wright* v. *Ingle* (2), for the restriction is imposed by statute for the benefit of all persons having houses in the street. The position must be considered as matters now stand, and not with regard to some future possibility of a release of the land from the restrictions at present imposed by statute: *Great Eastern Ry. Co.* v. *Hackney Board of Works.* (3) The provisions of s. 18 of the private Act cannot be released by the landowners; they cannot repeal the Act, and the possibility of a future repeal cannot be taken into consideration.

Macmorran, K.C., replied.

Cur. adv. vult.

Aug. 2. BIGHAM J. I have had an opportunity of examining the cases which were cited, and I think that the result of those cases is that, where land is incapable of yielding a rack-rent by reason of its being subjected to some public user, the owner is not liable; for instance, where it has been dedicated as a highway, or where a church has been built upon it which has been consecrated according to English law for public worship, or where it has been appropriated by Act of Parliament to some public purpose. But, where the incapacity is created in favour of an individual or of a particular class of persons, then the owner does not escape liability; for instance, where the owner has covenanted not to use the land for any purpose of profit, or where he has voluntarily devoted it to a purpose which is inconsistent with the receiving of rent, as in the case cited of a Wesleyan chapel: *Wright* v. *Ingle.* (2) The reason for the distinction seems to be that, in the one case, nothing short of an Act of Parliament can restore the land to its capacity to yield a rent, whereas, in the other case,

(1) (1875) L. R. 10 Q. B. 203. (2) 16 Q. B. D. 379.
(3) (1883) 8 App. Cas. 687, 695.

1904

HAMPSTEAD CORPORATION v. MIDLAND RAILWAY.

Bigham J.

the capacity can be restored by the mere act of the parties who for the time being have destroyed it. Then, into which category does the present case fall? I think into the second. It is true that the restriction which prevents the railway company from turning the land to a profitable use is embodied in an Act of Parliament. But the Act creates no public right; it does no more than give a legislative sanction to an agreement between Mr. Powell-Cotton and his trustees on the one hand, and the railway company on the other. Such an agreement can be put an end to by the parties to it at any moment, and apparently without the intervention of the Legislature: see *Goldsmid* v. *Great Eastern Ry. Co.* (1) The arguments adduced by Mr. Lush were put forward in that case by Mr. Hemming (2), and were dismissed as insufficient. They, therefore, do not afford any answer to the claim of the local authority to be paid the amount sued for. There must be judgment for the plaintiffs.

Judgment for the plaintiffs.

Solicitor for plaintiffs: *Arthur P. Johnson.*
Solicitors for defendants: *Beale & Co.*

(1) 25 Ch. D. 511. (2) 25 Ch. D. at p. 533.

W. A.

HAEDICKE *v.* FRIERN BARNET URBAN DISTRICT COUNCIL.

1904
May 11, 12;
June 7.

Local Government—Drain or Sewer—Pipe draining several Houses belonging to different Owners—"Single Private Drain"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 41—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19—*Nuisance—Abatement Notice—Service on Person not liable—Recovery of Expense.*

Four houses in the defendants' district, of which the plaintiff was the owner, together with sixteen houses belonging to other owners, were drained into a pipe which at a date prior to 1890 had been connected by the defendants with a public sewer. The whole of the pipe was on private ground. A nuisance having arisen from an obstruction in the pipe near one of the plaintiff's houses, the defendants served on the plaintiff a notice under s. 94 of the Public Health Act, 1875, requiring her to abate the nuisance and to relay the drain. The plaintiff, although contending that the pipe was a sewer and repairable by the defendants, did the work under protest, and sued the defendants to recover the expense as money paid by her under compulsion which the defendants were compellable to pay:—

Held, (1.) that the plaintiff had paid the money under compulsion: *North* v. *Walthamstow Urban District Council*, (1898) 67 L. J. (Q.B.) 972, followed; (2.) that although the pipe was a sewer as defined by s. 4 of the Public Health Act, 1875, it was also, on the authority of *Bradford* v. *Eastbourne Corporation*, [1896] 2 Q. B. 205, a "single private drain" within s. 19 of the Public Health Acts Amendment Act, 1890, but that the liability to repair the pipe remained on the defendants unless and until they put in force against the owners of the houses the procedure of s. 19 of the Act of 1890 and of s. 41 of the Act of 1875, and that, the defendants not having done so, the plaintiff was entitled to recover.

Reg. v. *Hastings Corporation*, [1897] 1 Q. B. 46, followed.

Thompson v. *Eccles Corporation*, [1904] 2 K. B. 1, discussed.

ACTION tried by Channell J. without a jury.

The facts as stated by the learned judge in his judgment were as follows:—

"In this case the plaintiff is the owner of four houses in Friern Barnet Road, within the district of the defendant district council, which houses were drained by the usual house drains into a 9-inch pipe, which was laid through the back gardens of these and other houses, about sixteen in number.

1904

HAEDICKE v. FRIERN BARNET URBAN COUNCIL.

That 9-inch pipe, when first laid, a considerable number of years ago, communicated with a similar pipe behind other houses, between thirty and forty in number, and both parts of the pipe were entirely on private ground, and the outfall was into a ditch or a cesspool, it does not clearly appear which. In 1888 the defendants or their predecessors constructed a sewer in the roadway, and they then made a communication from the 9-inch pipe into that sewer, so diverting the drainage of the sixteen houses through the 9-inch pipe into the sewer. The 9-inch pipe in the neighbourhood of one of the plaintiff's houses about January, 1903, became obstructed, and a nuisance was caused of which the occupier complained to the defendant council, and after some correspondence and the service of two notices, which I need not further refer to, the district council served a notice dated February 24, 1903, stating that the council were satisfied of the existence of a nuisance at 5, 7, and 9, Friern Barnet Road (being three of the four houses owned by the plaintiff), and requiring her within three days to abate the same, and for that purpose to relay the drains in the rear of the houses in a certain way, and also to reconstruct the water-closets and do other work within the houses. The notice was the ordinary notice for abatement of a nuisance, and was accompanied by a somewhat peremptory letter from the clerk to the council."

The notice was in the following terms:—

"Final Notice. Urgent.

"The Friern Barnet Urban District Council to Mrs. T. Haedicke or owner of Norfolk Villa, Brondesbury, N.W.

"Take notice that under the provisions of the Public Health Act, 1875, the Urban District Council of Friern Barnet, being satisfied of the existence of a nuisance at Nos. 5, 7, and 9, Friern Barnet Road, in the county of Middlesex, and within the district of the said urban district council, arising from defective drains, water-closet accommodation, &c., do hereby require you, within three days from the service of this notice, to abate the same, and for that purpose to relay the drains in rear of houses with sound glazed stoneware pipes, jointed in

cement upon concrete foundation, and all necessary inspection chambers and ventilating pipes, remove defective soil-pipes, discontinue the use of ground-floor water-closet, and reconstruct same on outer walls with windows opening directly into the external air.

"If you make default in complying with the requisitions of this notice, or if the said nuisance though abated is likely to recur, a summons will be issued requiring your attendance to answer a complaint which will be made to a Court of summary jurisdiction for enforcing the abatement of the nuisance and prohibiting a recurrence thereof, and for recovering the costs and penalties that may be incurred thereby."

"The plaintiff's husband, who managed her property, replied by a letter of February 25 stating that the notice related to a drain 'which is a combined drain or sewer.' The clerk replied by letter of February 27 that 'the drains in question are repairable by the owner and not by the local authority, and that the notice should be complied with without any further delay.' The plaintiff's husband replied by a letter dated February 28, in which he said that he would 'in self-defence do these repairs to the drainage and enforce payment in a Court of law.' The plaintiff then proceeded to do both the work inside the houses included in the notice, and also the work required to the 9-inch pipe. Under the direction of the defendants' surveyor the plaintiff took up the 9-inch pipe, not only behind the houses named in the notice, but also behind the house No. 3, which also belonged to her, adjoining to the houses named in the notice. The fall of the pipe was altered, and a 6-inch pipe substituted in the upper part. The plaintiff then brought this action to recover from the defendants the money expended on alteration of the 9-inch pipe and in remaking the connections with it (admitting, of course, that she must bear the expense of the inside work), on the ground that the work to the 9-inch pipe was work which the defendants ought themselves to have done."

Macmorran, K.C. (*Colam* with him), for the plaintiff. The plaintiff has been compelled to do work which the defendants

1904

HAEDICKE v. FRIERN BARNET URBAN COUNCIL.

were legally compellable to do, and the plaintiff is therefore entitled to recover the expense incurred as money paid at the defendant's expense. The service of the notice amounts to a "request": *North* v. *Walthamstow Urban District Council* (1); *Cree* v. *St. Pancras Vestry* (2); *Harris* v. *Hickman* (3); *Oliver* v. *Camberwell Borough Council.* (4) The defendants were legally compellable to do the work, because as the pipe in question drained more than one house it was a sewer as defined by the Public Health Act, 1875, and not, as will be contended by the defendants, a "single private drain" within s. 19 of the Public Health Act, 1890. On this point the recent decision of the Divisional Court in *Thompson* v. *Eccles Corporation* (5) is indistinguishable from the present case, and is a binding authority in favour of the plaintiff. This pipe never was and never could be a single private drain. It received the drainage of several houses, and originally was connected, not "with a public sewer," but with a cesspool. The pipe was subsequently connected by the local authority with the public sewer; but that act of the local authority cannot convert that which was previously a sewer into a single private drain: *Vestry of St. Leonard, Shoreditch* v. *Phelan.* (6) But even if in spite of *Thompson* v. *Eccles Corporation* (5) the pipe could have been dealt with by the defendants as a single private drain under s. 19, it nevertheless remains a sewer vested in the defendants, and repairable by them unless and until the defendants put in force s. 19. The defendants have never done so. Before s. 19 of the Act of 1890 and s. 41 of the Act of 1875 can be enforced there must have been a written complaint of a nuisance, notice must be given to the owners of the various houses, and the expense of the work must be apportioned between them: *Reg.* v. *Hastings Corporation* (7); *Lancaster* v. *Barnes District Council.* (8) None of these conditions has been fulfilled, and the notice that was served on the plaintiff was not a notice under s. 41, but under s. 94 of the Act of 1875. In any case the plaintiff

(1) 67 L. J. (Q.B.) 972.
(2) [1899] 1 Q. B. 693.
(3) [1904] 1 K. B. 13.
(4) (1904) 68 J. P. 165.
(5) [1904] 2 K. B. 1.
(6) [1896] 1 Q. B. 533.
(7) [1897] 1 Q. B. 46.
(8) [1898] 1 Q. B. 855.

would not have been liable to pay for all the work, but only for her apportioned part. The liability to repair, therefore, never fell upon the plaintiff, but remained in the defendants.

Clavell Salter, K.C. (*W. H. Duckworth* with him), for the defendants. It is not contended that the plaintiff was not compelled to do the work, but the defendants were not compellable to do it. First, assuming the pipe is a sewer, a local authority, though bound to repair sewers generally, cannot be compelled to carry out a particular repair: *Self* v. *Hove Commissioners* (1); *Pasmore* v. *Oswaldtwistle Urban District Council* (2); *Robinson* v. *Workington Corporation.* (3) Secondly, the pipe is not a sewer, but is a "single private drain" within s. 19 of the Act of 1890. The decisions as to the meaning of the expression "a single private drain" are conflicting. In *Self* v. *Hove Commissioners* (1), the facts of which cannot be distinguished from the present case, Wills and Wright JJ. were of opinion that the pipe was a single private drain. In *Hill* v. *Hair* (4) Cave J. criticized and disagreed with that view, and held that a pipe which had been a sewer within the Public Health Act, 1848, could not be a single private drain. It is true that the local Act on which *Hill* v. *Hair* (4) was decided did not contain the words "belonging to different owners" which appear in s. 19, nor was there any section corresponding to sub-s. 3 of s. 19; but Cave J. did not base his judgment on the difference between the local Act and s. 19. In *Bradford* v. *Eastbourne Corporation* (5) Wills J. replied to the criticisms of Cave J. on *Self* v. *Hove Commissioners* (1), and the Court held that, although a pipe might be a sewer as defined by the Public Health Act, it could also be a single private drain. Then in *Seal* v. *Merthyr Tydfil Urban District Council* (6) Cave J. admitted that *Hill* v. *Hair* (4) was wrongly decided, and followed *Bradford* v. *Eastbourne Corporation.* (5) In the most recent case, *Thompson* v. *Eccles Corporation* (7), the Court appear to have declined to follow *Bradford* v. *Eastbourne*

(1) [1895] 1 Q. B. 685.
(2) [1898] A. C. 387.
(3) [1897] 1 Q. B. 619.
(4) [1895] 1 Q. B. 906.
(5) [1896] 2 Q. B. 205.
(6) [1897] 2 Q. B. 543.
(7) [1904] 2 K. B. 1.

1904

HAEDICKE v. FRIERN BARNET URBAN COUNCIL.

Corporation (1), and to have reverted to the view expressed by Cave J. in *Hill* v. *Hair*. (2) It is submitted that the meaning put upon "a single private drain" in *Bradford* v. *Eastbourne Corporation* (1) is the right one. The Public Health Act, 1875, s. 4, defines "drain" as a drain used for the drainage of one building only or premises within the same curtilage; and s. 41 provides the method for dealing with a nuisance created by a drain so defined. Then s. 19 of the Act of 1890 enables s. 41 to be applied in a case where two or more houses belonging to different owners are connected with a public sewer by a single private drain; and by sub-s. 3 of s. 19 the expression "drain" in s. 19 includes a drain used for the drainage of more than one building. Thus, although a pipe may be a sewer in that it drains more than one building, yet if it goes solely through private land into a public sewer, then for the purposes of repair it is to be a drain, and to be governed by s. 19; for all other purposes it may remain a sewer. It is objected to this argument that it produces the absurd result that the section would not apply if all the houses belonged to the same owner, in which case the pipe would be a sewer, though if one of the houses happened to be sold the pipe would ipso facto cease to be a sewer and become a single private drain. If no practical meaning can be given to the section the Court must ignore an absurd result; but a possible absurdity in one case is no reason for not applying the section to cases clearly within it.

The other cases which it has been suggested the section might apply to will not on examination be found to come within the section. In *Hill* v. *Hair* (2) Cave J. thought it might be intended to apply to buildings within the same curtilage; but the essential idea of buildings within the same curtilage is that they all belong to the same owner—e.g., a house and stable. It has also been said that the section would apply to the case of a sewer made by a person for his own profit; but, as was pointed out by Wills J. in *Bradford* v. *Eastbourne Corporation* (1), "the class of sewers made by any

(1) [1896] 2 Q. B. 205. (2) [1895] 1 Q. B. 906.

person for his own profit seems according to the authorities to be of a kind totally different from any that are the least likely to come within the operation of s. 19 of the Act of 1890": *Bonella* v. *Twickenham Local Board* (1); *Ferrand* v. *Hallas Building Co.* (2); *Minehead Local Board* v. *Luttrell.* (3) In *Thompson* v. *Eccles Corporation* (4) Channell J. thought s. 19 might apply to a case where by agreement between a local authority and a building owner a system of combined damage was sanctioned on the terms of repairs being done by the owner; but, apart from the question whether an agreement of that kind would be ultra vires, it could not alter the status of the pipe, which is regulated by Act of Parliament. The argument, once a sewer always a sewer, ignores the fact that unless a pipe is a sewer, i.e., drains more than one building, it does not come within s. 19 at all. It is said that the defendants have not followed the procedure of s. 19 and s. 41; but if it is necessary that there should have been a written complaint, the omission could be and was waived. The apportionment is a subsequent and subsidiary matter. There is nothing in the notice to shew that it was not intended to be served under s. 41, and it contains all the essentials of a notice under that section. The fact that the procedure of s. 19 has not been followed cannot alter the status of the pipe. If it is a single private drain, then the liability to repair was on the plaintiff, not on the defendants, and therefore the defendants were not compellable to do the work.

Macmorran, K.C., in reply. An action will lie against a local authority under s. 19 of the Public Health Act, 1875, for permitting a sewer to be so kept as to be a nuisance. *Robinson* v. *Workington Corporation* (5) and the other cases cited for the defendants only relate to the failure of a local authority to provide sewers. They do not decide that an action will not lie for the breach of the duty imposed by s. 19 of the Act of 1875.

Cur. adv. vult.

(1) (1887) 20 Q. B. D. 63.
(2) [1893] 2 Q. B. 135.
(3) [1894] 2 Ch. 178.
(4) [1904] 2 K. B. 1.
(5) [1897] 1 Q. B. 619.

1904

HAEDICKE v. FRIERN BARNET URBAN COUNCIL.

June 7. CHANNELL J. read the following judgment, in which, after stating the facts as set out above, he continued as follows :—The first question which was argued was whether under these circumstances, even if the expense incurred by the plaintiff was in respect of work which the defendants ought themselves to have done, the plaintiff can recover, or whether she was merely in the position of a volunteer who had voluntarily chosen to perform the obligation of another person. If my decision in *North* v. *Walthamstow Urban District Council* (1) is correct, the plaintiff clearly can recover ; but in my opinion the present case is stronger in favour of the plaintiff than that was. There, as in many of the cases, the plaintiff acquiesced at the time in the notice served on him, and only claimed to be reimbursed by the local authority when he subsequently discovered either facts or law which in his view threw the burden on the local authority. In the present case the plaintiff, through her husband, acting as her agent, protested at the time, and under protest submitted to the defendants' notice and threats. Under these circumstances there is really no difficulty in implying the necessary promise on the part of the defendants to reimburse the expenditure if their contention as to the liability proved to be wrong. I think still that my decision in *North* v. *Walthamstow Urban District Council* (1) was right, and was entirely justified by the authority of *Andrew* v. *St. Olave's Board of Works* (2), on which it was based. I do not think any case, except possibly *Oliver* v. *Camberwell Borough Council* (3), in any way shakes such authority as my decision might otherwise have had. In that case, *Oliver* v. *Camberwell Borough Council* (3), Wills J. expressly agreed with my view, and he and Kennedy J. decided that case on the ground that there had been only an intimation and not a statutory notice, and they thought, rightly or wrongly, that certain cases to which they referred were authorities which shewed the difference between an intimation and a notice to be important. It seems to me, I must

(1) 67 L. J. (Q.B.) 972. (2) [1898] 1 Q. B. 775.
(3) 68 J. P. 165.

say, that at least two of the cases to which they referred, including the one, *Thompson* v. *Hawes* (1), on which they really based their judgment, were quite different. *Thompson* v. *Hawes* (1) was a case in which a tenant was suing his landlord for money paid under alleged compulsion of a local authority. It seems to me that there the tenant would have to prove real compulsion. In *Harris* v. *Hickman* (2) the action was by the landlord against the tenant, and raised a similar question. It is quite different where one person sues another in respect of money alleged to have been paid by him by reason of pressure put on him by the person whom he is suing. When suing a third party, such as his landlord, the plaintiff has to prove that he was actually compelled—that the proceedings against him were such as he could not have effectually resisted; whereas when a plaintiff is suing the person who put on the compulsion, the fact of the compulsion being such as must succeed would probably be fatal to his case. Here, if the plaintiff had defended the proceedings which would have followed on her non-compliance with the defendants' notice, she would have been entitled to ask the magistrate to say that she was not the person by whose act and default the nuisance had arisen, but that the defendants were. If that question had been decided against her by a Court of competent jurisdiction, and the decision had stood without successful appeal, the plaintiff never would have recovered the money from the defendants, at all events unless she could have shewn (as it is suggested by Lord Russell of Killowen C.J. in *Andrews* v. *St. Olave's Board of Works* (3), that she might possibly have done) that both were liable. On the whole I come to the conclusion that on the facts before me the plaintiff may recover if she shews that the obligation to keep this 9-inch pipe in repair was on the defendants. It is, as it seems to me, an ordinary case of recovering money extorted by duress and paid under protest.

I pass now to the question whether it was the duty of the defendants to do what was required to this 9-inch pipe. Dealing

(1) (1895) 59 J. P. 580. (2) [1904] 1 K. B. 13.
(3) [1898] 1 Q. B. 775.

1904

HAEDICKE v. FRIERN BARNET URBAN COUNCIL

Channell J.

with the question in the first instance, apart from the Public Health Acts Amendment Act, 1890, the pipe was undoubtedly a sewer within s. 4 of the Public Health Act, 1875, vested in and under the control of the defendants by s. 13, which by s. 15, unless a distinction can be drawn between "vested in" and "belonging to," the defendants had an express duty to repair. Wright J. has, both in *Self* v. *Hove Commissioners* (1) and in *Reg.* v. *Hastings Corporation* (2), suggested that there is no duty on a local authority to do specific works, and that the general duty of properly draining their district can only be enforced at the instance of the Local Government Board. This is so as regards the general duty: see *Pasmore* v. *Oswaldtwistle Urban District Council* (3); but where an existing sewer belonging to the local authority is out of repair they are bound by s. 15 to repair it. If they were bound to repair the defects in the 9-inch pipe (which apart from the Act of 1890 they clearly were), I do not think that they are at liberty to say that the works done at their instance, and under the direction of their surveyor, were not works necessary to remedy the defects in the pipe. This, I think, prevents the defendants saying that the works, the expense of which the plaintiff is seeking to recover, were different works from those, if any, which they would themselves have been liable to do. It is true that they would have had a wide discretion as to what should be done, but they have in my opinion exercised their discretion so as to preclude themselves from objecting to what the plaintiff did, and they directed the works which were done behind house No. 3 as well as those behind the other houses. If therefore the Act of 1890 had never been passed, I think that, subject to small questions of amount, the plaintiff's action would have been maintainable.

It remains to consider the difficult question of the construction of s. 19 of the Public Health Act, 1890, and its effect on the question in this action. That section has been considered in *Self* v. *Hove Commissioners* (1), *Hill* v. *Hair* (4), *Bradford* v. *Eastbourne Corporation* (5), *Seal* v. *Merthyr*

(1) [1895] 1 Q. B. 685.
(2) [1897] 1 Q. B. 46.
(3) [1898] A. C. 387.
(4) [1895] 1 Q. B. 906.
(5) [1896] 2 Q. B. 205.

Tydfil Urban District Council (1), and possibly in other cases, and lastly in a case of *Thompson* v. *Eccles Corporation* (2), decided recently in the Divisional Court and reported since the argument of this case before me. I was a party to that last case, which is now said to be contrary to *Bradford* v. *Eastbourne Corporation* (3); and now that I have had the opportunity of examining the cases again, with the assistance of extremely clear arguments by Mr. Macmorran and Mr. Clavell Salter, I feel bound to say that I do not consider the last case a satisfactory decision. Whether it does differ from the *Eastbourne Case* (3) or not, and whether, if it does, it is right or wrong in so doing, the Court of Appeal, to which I understand the case has been taken, will, of course, decide; but I may say at once that, although I adhere to what I appear to have said as to the curious effect of s. 19 and its general construction, I see now that I omitted altogether to notice what I now think to be an important point in the case. Counsel in the *Eccles Case* (2) referred the Court to the *Eastbourne Case* (3), but did not call our attention to it in detail. I did not have the report actually before me, nor, so far as I recollect, did my brothers. We all thought we knew, and no doubt we did know, its general effect. I do not desire to put the blame on counsel, for what they did was to attribute to me a more accurate knowledge of all the points decided in the *Eastbourne Case* (3) than I in fact possessed. The *Eccles Case* (2) was argued before us as if the question was whether the pipe was a sewer or whether it was a drain. It was suggested that it might be a sewer at one part of its course, when it was serving several houses belonging to one owner, and that at another part of its course, when it was, in addition, serving another house belonging to another person, it would cease to be a sewer and would become "a single private drain." It was also suggested that the mere fact that it drained the houses of more than one owner made it, ipso facto, a drain as distinguished from a sewer; and, further, that it was not a case of "houses belonging to different owners," because two out of

(1) [1897] 2 Q. B. 543. (2) [1904] 2 K. B. 1.
(3) [1896] 2 Q. B. 205.

1904

HAEDICKE v. FRIERN BARNET URBAN COUNCIL.

Channell J.

the twelve houses or so belonged to the same person. Those arguments did not commend themselves to me then or now. They certainly shew the difficulties arising out of the section; but it was not brought home to my mind that what was really decided in the *Eastbourne Case* (1) was that, on the true construction of s. 19 of the Act of 1890, a thing which for all other purposes was a sewer might for the purposes of that section be the thing referred to in the section as a single private drain. The reasoning of the Court on sub-s. 3 of s. 19 is very strong as to this when the case is carefully read. I cannot speak with the same freedom of the judgments of my learned brothers in the *Eccles Case* (2) as I can of my own, but I do not think that this point was present to their minds any more than it was to mine. I observe that what the Lord Chief Justice said of the matter was that it could not now be disputed that under the Act of 1875 a drain-pipe which receives the drainage of more than one building is a sewer none the less because it is made entirely through private property. In that I agreed at the time and agree now; but I now think that it did not conclude the question, and that we ought to have gone on to consider the question whether, notwithstanding that the construction which we had then to deal with was a sewer under the Public Health Act, 1875, it was not also a construction in respect of which the powers of s. 19 of the Act of 1890 might be exercised. I think that s. 19 may be paraphrased thus, leaving out some immaterial words and altering others to shew the meaning which I attach to them: "Where two or more houses are connected with a public sewer, not by a separate drain for each house, as the local authority may require them to be, but by one drain for all the houses, that drain, provided it is a private drain and notwithstanding that it is for purposes other than this section a sewer, may be dealt with under s. 41 of the Public Health Act, 1875, notwithstanding that all the houses do not belong to the same owner, and the expenses may be recovered from the owners of the houses in such proportion as the surveyor may settle." In this paraphrase, as in the section itself, the difficulty is to see what is

(1) [1896] 2 Q. B. 205. (2) [1904] 2 K. B. 1.

meant by "private drain." Now, the section is in an Act which local authorities have the option of adopting if they like. One would think that such an Act would be confined to machinery for enforcing and dealing with existing rights and liabilities, and would not be found to have the effect of substantially altering rights and creating new liabilities, or at all events that it would not enable a local authority, by adopting the Act, to relieve themselves from liability to repair existing structures and to transfer that liability to private owners. Further, if it were really intended to transfer to private owners the liability of maintaining structures which before the adoption of the Act had been maintained by the public, it is inconceivable that it could have been intentionally enacted that that liability should be so transferred when the houses did not all belong to the same owner, but that if the houses, though constructed and drained in precisely the same way, happened to belong to one person, that person should be entitled to have his drain kept in order at the expense of the public. There are, therefore, very strong grounds for holding that when the section contrasts, as it clearly does, "private drain" with "public sewer," the words "private" and "public" refer to the liability to repair being on private owners and on the public respectively. If I had to construe the section apart from the authority of the *Eastbourne Case* (1), I should certainly say that if such things could be found as drains connecting more than one house with a public sewer which were, apart from the Act of 1890, repairable by the owners of the houses, those were the things referred to as "private drains," and that the intent of the section was to provide machinery for dealing with such cases when there was more than one owner and for apportioning the expense. I agree that such things would not be numerous, but I do not at all think that they are non-existent. In addition to the case suggested by Cave J. in *Hill* v. *Hair* (2), I think there are, in fact, a considerable number of cases of semi-detached houses or small rows of three or four houses which private owners repair either under provisions of a local Act more or less similar to the combined

(1) [1896] 2 Q. B. 205. (2) [1895] 1 Q. B. 906.

1904

HAEDICKE v. FRIERN BARNET URBAN COUNCIL.

Channell J.

drainage clause of the Metropolis Management Acts, or under conditions imposed by local authorities when asked to consent to such modes of drainage. During the argument of this case before me, and upon my stating that I believed such cases did exist, a gentleman who was a clerk to a local authority not engaged in this case, but who happened to be in Court, stated through Mr. Macmorran, who was arguing the case, that he personally knew many such cases; and Mr. Macmorran, who himself has a large experience, was of the same opinion. I adhere, therefore, personally to the opinion I expressed in *Thompson* v. *Eccles Corporation* (1), that Cave J.'s view was the most logical solution of the difficulties arising from the section, though his instances are not, in my opinion, exhaustive. I think, however, after a careful consideration of the *Eastbourne Case* (2), that the contrary was there decided, and I do not think it is open to me to disregard that decision, more especially as Cave J. in the subsequent case of *Seal* v. *Merthyr Tydfil Urban District Council* (3) himself followed it. I must therefore hold that "private" in s. 19 refers, not to private liability to repair as distinguished from public, but to the fact that the structure is on private ground. I doubt whether the Court in the *Eastbourne Case* (2) intended to hold that all sewers on private ground draining houses of more than one owner and communicating with a sewer in a highway were to be held to be "single private drains." To my mind, although "two or more" includes "more than two," and a hundred is more than two, yet "two or more" was never meant to include a hundred. Here there were a very considerable number of houses all drained into what seems to me to be, not merely by the definition in the Public Health Act, 1875, but in fact, a sewer going along the back of the houses instead of at the front, and going through the back gardens—that is, no doubt, through private ground, but still in every respect of the character of what is ordinarily called a sewer. I am not sure that the judges who decided the *Eastbourne Case* (2) would really have held this to be a "single private drain"; but there were a

(1) [1904] 2 K. B. 1. (2) [1896] 2 Q. B. 205.
(3) [1897] 2 Q. B. 543.

considerable number of houses involved in that decision, and still more apparently in *Seal* v. *Merthyr Tydfil Urban District Council* (1), so I ought not to distinguish this case on that ground. I do not think the recent decision of *Thompson* v. *Eccles Corporation* (2), decided as I think it was by inadvertence (unless distinguished on the last ground by reason of the number of houses), would justify me in disregarding the *Eastbourne Case*. (3) I have commented on the extraordinary result of this legislation, that the same structure must be repaired by the local authority if it serves the houses of one person only, but that if it serves different owners, those different owners may be required to repay the expense of making it good. It is, however, right to point out that the thing which is extraordinary is not the enactment as to several owners, but the omission to enact the same thing when there is only one owner. This omission appears clearly accidental. The draftsman of the section must have thought, and the Legislature which adopted his language must have thought, that this had been already provided, and consequently by a misapprehension omitted to provide for it. It is this omission that is mischievous, rather than the enactment as interpreted by the *Eastbourne Case* (3); but it is right to point out that the real difficulty in the way of the Courts doing justice in so many of the cases on this subject arises from the automatic vesting in the local authorities of all sewers, and the automatic imposition of liability for their maintenance and repair by reason merely of the form of the construction and the purpose they serve, and without any assent or acceptance on the part of the local authority. If it were provided that no sewer should be repairable by a local authority until adopted and taken over, as is the case with regard to a new highway, proper provision being, of course, made for requiring local authorities to take over such sewers on notice and on their being put in proper order, all these difficulties would disappear. The difficulty as to the effect of a surreptitious and wrongful joinder of one drain with another, the difficulty of knowing on

(1) [1897] 2 Q. B. 543. (2) [1904] 2 K. B. 1.
(3) [1896] 2 Q. B. 205.

1904

HAEDICKE v. FRIERN BARNET URBAN COUNCIL.

Channell J.

whom the liability to repair a particular structure is, would all be got rid of, and, so far as I see, the existing machinery would all work satisfactorily as regards all drains or sewers made after such an amendment of the law. It is a discredit to our Legislature, or the departments of the executive which have charge of such matters, that so simple an amendment of the law should not have been made long ago, as for the last fifteen years or more there has been constant litigation on these points. Of course, if there is to be an amendment of the law, it would be desirable, besides the simple amendment required to prevent difficulty as to future constructions, to have some declaratory enactment dealing with existing structures, and I presume it is the difficulty of framing satisfactorily such a declaratory enactment which has led to there having as yet been no amendment of the law.

I have now to consider how the view I have expressed as to the *Eastbourne Case* (1) and the *Eccles Case* (2) affects the case now before me. I must hold that, in the present case, if the defendants had proceeded under s. 41 of the Act of 1875 and s. 19 of the Act of 1890, they would have been able to impose a proportion of the charge, the subject of the action, on the plaintiff. It would be a proportion only, because the cost, if the proceedings had been taken in that way, would have fallen, not on the owner on whose property the defect happened to be, but on the owners jointly in proportions to be settled by the surveyor. The defendants did not, in fact, take any proceedings under that section. I do not lay any stress on the fact that the complaint of the nuisance was not in writing in the first instance, and was only put into writing by the authority when received, or that notice in writing of intention to enter was not given. Those provisions (or at any rate the notice to enter) are clearly introduced for the benefit of the occupier and may be waived by him, and were so in this case. The reason I say the defendants were not really acting under s. 19 is that they did not give notice to all the owners, and were seeking to impose the whole liability on the plaintiff on the ground that the nuisance arose on her premises. It is neces-

(1) [1896] 2 Q. B. 205. (2) [1904] 2 K. B. 1.

sary, however, to consider the case on the basis that proceedings might have been taken under s. 19, because if the defendants were not liable to repair, but the owners jointly were, the plaintiff has a difficulty in shewing that when incurring the expenses sued for she was performing the defendants' obligation, and was paying the money for the defendants. To meet this point *Reg.* v. *Hastings Corporation* (1) was quoted by Mr. Macmorran. There a mandamus appears to have been issued to a local authority to repair a structure to which s. 19 of the Act of 1890 was assumed, rightly or wrongly, to be applicable. It was, however, said that there no complaint of a nuisance existing had been made to the local authority, and that until such complaint the powers of s. 19 did not arise. This seems an authority that in cases under s. 19 the burden of repair does remain on the local authority, but with power in a special event and by special proceedings to recover over against other persons. I think this as an authority is equally binding on me as the *Eastbourne Case* (2); but it is not completely in point, because in the case before me I think there was a sufficient complaint to give the defendants jurisdiction to proceed under s. 19. They did not, however, so proceed, and in particular the proportion to be payable by the various owners has never been assessed by the surveyor. The apportionment by the surveyor appears to me to be a condition precedent to any portion of these expenses being payable by the plaintiff. I must therefore hold, not without considerable hesitation, that the defendants have by the duress of an erroneous notice in a case of nuisance, when prompt action was necessary, compelled the plaintiff to incur under protest expenses which the defendants were, in the then existing state of things, themselves liable to. If the apportionment of the surveyor were a mere matter of form, and I had myself the materials for making the calculation of how much the plaintiff ought to bear, I should probably hold that the plaintiff could only recover the excess beyond her own proportion of the expenditure. But I have no materials for making the apportionment, and it appears to me a matter specially delegated to the surveyor. I do not,

(1) [1897] 1 Q. B. 46. (2) [1896] 2 Q. B. 205.

1904

HAEDICKE v. FRIERN BARNET URBAN COUNCIL.

Channell J.

therefore, see how I can do otherwise than hold that the plaintiff is entitled to recover the whole expenses of the work, which I assess at 65*l.* I think no deduction should be made for the part of the work done at No. 3, but I do not think that the loss of rent which was claimed was made out in such a way as to be recoverable. I therefore give judgment for the plaintiff for 65*l.* with costs.

Judgment for the plaintiff.

Solicitors for plaintiff: *Emanuel & Simmonds.*
Solicitors for defendants: *R. Miller, Wiggins & Naylor.*

F. O. R.

C. A.

1904

Aug. 8.

[IN THE COURT OF APPEAL.]

BOLLAND *v.* YOUNG.

Practice—Judgment Debt—Charging Order—Interest in Stock—Judgments Act, 1838 (1 *&* 2 *Vict. c.* 110), *s.* 14—*Judgments Act*, 1840 (3 *&* 4 *Vict. c.* 82), *s.* 1.

An American lady, who died in 1903, left a will by which she appointed two persons her executors and trustees with regard to all moneys, bonds, bankers' balances, securities, and property carried on account, or held in custody on her behalf by her bankers or attorneys in England at her death, and she directed her executors and trustees to collect and gather together all such residue of her estate in England at her death, both principal and interest, capital and income, and to invest and reinvest, as from time to time might be prudent, and to manage the whole fund; and she further directed them to accumulate the income of the fund for the period of six years after her death, and at the end of that period to apply the accumulations of income in a certain manner, and to divide the capital of her estate then in their custody and control into three equal parts, one of which was to be paid to and to become the sole property of a person named in the will, against whom a judgment had been recovered in the High Court. The funds subject to the trusts of the will had been invested in Transvaal Government stock:—

Held, that the judgment debtor had an interest in the stock which might be charged with the amount of the judgment debt under the Judgments Act, 1840.

APPEAL from an order made by Phillimore J. at chambers, discharging an order nisi which charged the interest of a judg-

ment debtor in certain Transvaal Government stock with the amount payable under the judgment.

The judgment creditor, one Bolland, had on June 24, 1904, recovered a judgment for 208*l.* and costs in the High Court against the judgment debtor, one Charles Oram Lander Young.

An American lady, since deceased, had made a will in the following terms: "As to all moneys, bonds, bankers' balances, securities, and property of every description, carried on account, or held in custody on my behalf by Baring Brothers & Co., or any other bankers or attorneys in England, at my death, I hereby constitute and appoint my two friends, Percy Howell Cathcart and Henry R. Isaacs, both of London, England, and the survivor of them, to be executors and trustees for said portion of my estate in England, and I direct them and the survivor of them, with such advice from Baring Brothers & Co. as they may find expedient, to collect and gather together all such residue of my estate in England at my death, both principal and interest, capital and income, and to invest and reinvest, as from time to time may be prudent, and to manage the whole fund: and I direct them to invest all interest or income accumulating after my death as well as the capital thereof. At the end of six years after my death, I direct my said executors and trustees, or the survivor of them, to divide the total accumulated dividends, income, and interest of said period into two equal and distinct parts, one equal part thereof to be paid to my third cousin, and adopted son, Frederick Charles Lander, and the other equal part thereof to be paid to Charles Oram Lander Young, known as Charles Lander, my second cousin, to be used by him for the benefit and education of his children; and, furthermore, at the end of six years after my death I direct my said executors and trustees, or the survivor of them, to divide all the capital of my estate then in their custody and control into three equal and distinct parts, one-third to be paid to and to become the sole property of my said adopted son, Frederick Charles Lander, and one-third part to be paid to and to become the sole property of the said Charles Oram Lander Young, known as Charles Lander, but the remaining equal third part I direct to be further kept

C. A. 1904

BOLLAND v. YOUNG.

invested and reinvested by said executors and trustees, or the survivor of them, together with its accumulations, thenceforth until the expiration of ten years from my death, at the end of which period the whole of said fund shall be paid to and become the sole property of the then surviving children of said Charles Oram Lander Young and of his wife Emily Penruddock Lander, said fund with capital, income, and all accumulations, to be then equally divided among the said children then surviving. In case of the death of either or both said Frederick Charles Lander or Charles Oram Lander Young before the expiration of six years from my death I direct that the lawful issue then living shall take the parent's share; otherwise and in case of either's death before said expiration of six years from my decease leaving no lawful issue then surviving, I direct that his share shall vest in the survivor of the two, or, if both be dead, in such lawful issue of either as may then exist in the nearest degree. This will is expressly confined in operation to such property of mine as may be in England at the time of my death as expressed in the first paragraph, and does not extend to any other part of my estate controlled, situated, or held in custody elsewhere."

The testatrix died in 1903, and the will was proved in December of the same year. The funds subject to the trusts of the will had been invested by the trustees in 4442*l.* 14*s.* 6*d.* Transvaal Government 3*l.* per Cent. Guaranteed Stock, which stood in the books of the Bank of England in the names of the trustees of the will.

An order nisi had been obtained by the judgment creditor charging the judgment debtor's interest in the above-mentioned stock with the amount due on the judgment. On application to Phillimore J. he discharged the order nisi upon the authority of *Dixon* v. *Wrench*. (1)

Montague Lush, *K.C.*, and *Firminger*, for the judgment creditor. The judgment debtor has under the will an interest in the stock in question, which may be charged with the judgment debt under 3 & 4 Vict. c. 82, s. 1. The decision in

(1) (1869) L. R. 4 Ex. 154.

Dixon v. *Wrench* (1) proceeded on the footing that the will in that case did not give the judgment debtor any interest in the shares which it was sought to charge, because there was an absolute direction to convert the shares into money, and to apply the proceeds in payment of debts and certain pecuniary legacies, and to divide the residue equally between the judgment debtor and two other persons. It was held that under these provisions the judgment debtor had no interest in the shares, but only a contingent interest in the proceeds of the sale of them. In the present case the trustees are under no obligation to sell the stock. At the end of the six years, if the fund remains invested in that stock, the judgment debtor, if then living, will become entitled to one-third of the capital of the fund in possession, and may claim to have his share of the stock transferred to him in specie. It was held in *South Western Loan and Discount Co.* v. *Robertson* (2) that the fact that stock stands in the name of trustees in trust for another besides the judgment debtor does not prevent a charging order from being made under 1 & 2 Vict. c. 110, s. 14. *Cragg* v. *Taylor* (3) is a clear authority in favour of the judgment creditor's contention.

Wheeler, K.C., and *R. C. Saunders*, for the judgment debtor. The principle of *Dixon* v. *Wrench* (1) applies to the present case, and shews that the judgment debtor has no interest in the stock in question which can be made the subject of a charging order under 1 & 2 Vict. c. 110 or 3 & 4 Vict. c. 82. The trustees have under the will power to sell the stock at any moment and reinvest the trust funds; and, in the event of debts turning up, as executors they would be under an obligation to sell the stock or so much of it as might be necessary to meet the debts. The effect of the will is not to give the judgment debtor any interest in specie in the stock in which the trust fund is for the moment invested, but merely to entitle him at the end of the six years to a third share of the money represented by the then existing investments. The terms of the will imply that at the end of the six years the

(1) L. R. 4 Ex. 154. (2) (1881) 8 Q. B. D. 17
(3) (1867) L. R. 2 Ex. 131.

C. A. 1904

BOLLAND v. YOUNG.

fund is to be converted into money, and a division made of the proceeds in accordance with the terms of the will.

[They also cited Lewin on Trusts, 10th ed. pp. 988, 989.]

STIRLING L.J. In this case the question is whether an order can be made charging the interest of a judgment debtor in certain stock with the amount payable on the judgment under 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, s. 1.

By the first-mentioned enactment it is provided that, "If any person against whom any judgment shall have been entered up in any of Her Majesty's superior Courts at Westminster shall have any Government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not) standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior Courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them, or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor, provided that no proceedings shall be taken to have the benefit of such charge, until after the expiration of six calendar months from the date of such order." That enactment applies to stock, &c., standing in the name of the judgment debtor in his own right, or in the name of some person in trust for him. The provisions of that enactment were, however, extended by the 3 & 4 Vict. c. 82, s. 1, which provides that they "shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent, as well in any such stocks, funds, annuities, or shares as aforesaid as also in the dividends, interest, or annual produce of any such stock, funds, annuities, or shares."

The question in the present case arises with regard to the interest of the judgment debtor under a will made by an

American lady disposing of her property in this country. By that will, as to all moneys, bonds, bankers' balances, securities, and property of every description, carried on account, or held in custody on her behalf, by Baring Brothers & Co., or any other bankers or attorneys in England at her death, she appointed her two friends, Percy Howell Cathcart and Henry R. Isaacs, to be executors and trustees for the said portion of her estate in England, and she directed them to collect and gather together all such residue of her estate in England at her death, both principal and interest, capital and income, and to invest and reinvest, as from time to time might be prudent, and to manage the whole fund. She further directed them to invest all interest or income accumulating after her death as well as the capital thereof, and, at the end of six years after her death, to divide the total accumulated dividends, income, and interest of the said period into two equal and distinct parts, one equal part thereof to be paid to her third cousin and adopted son, Frederick Charles Lander, and the other equal part thereof to be paid to the judgment debtor, Charles Oram Lander Young, known as Charles Lander, her second cousin, to be used by him for the benefit and education of his children. I do not say that any order can be made to affect the share of the accumulations so given to the judgment debtor, for it may be contended that the will merely made him a trustee to apply this fund for the benefit of his children. But the will proceeds to provide that, at the end of six years after the death of the testatrix, the executors and trustees shall divide all the capital of the estate then in their custody and control into three equal parts, and that one of those third parts shall be paid to and become the sole property of the judgment debtor. The question is whether the judgment debtor has, in respect of that third share of capital under the will, such an interest in the stock in question as comes within the meaning of the words "interest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent" in the statute 3 & 4 Vict. c. 82, s. 1. In this case there is no stock standing in the name of the judgment debtor; but there is a certain amount of Transvaal Government stock, which is admitted to be such a

C. A. 1904

BOLLAND v. YOUNG.

Stirling L.J.

stock as comes within the provisions of 1 & 2 Vict. c. 110, s. 14, standing in the names of the trustees of the will, and which appears to constitute the whole of the funds subject to the before-mentioned trusts, one of those trusts being that at the end of six years from the death of the testatrix a third part of the capital of her estate in England shall be paid to and become the sole property of the judgment debtor. The argument for the judgment debtor, as I understand it, is that he has no interest in this stock within the meaning of 3 & 4 Vict. c. 82, s. 1, because the executors and trustees are, or may be, under an obligation to convert this stock into money, and consequently the only interest of the judgment debtor is, not in the stock, but in the proceeds of the sale of it, as was the case in *Dixon* v. *Wrench*. (1) That depends upon the effect of the will. It was said that the trustees were also executors, and that there might be debts; and, if so, the executors might be under an obligation to convert this stock or a portion of it, in order to pay those debts. That is no doubt true, and the interest taken by the judgment debtor is taken subject to that contingency. If a debt turned up, the executors might have to convert a sufficient amount of the stock to meet it, but that does not prevent the judgment debtor from having an interest in so much of the stock as may remain. No debt might be proved, and, in that case, the sole obligation of the trustees would be during the six years to accumulate the income, and, at the end of that period, to divide the capital into three equal parts, one of which is to become the property of the judgment debtor. It was argued that there would be an obligation at the end of the six years to convert the stock into money. The only obligation appears to be to divide the capital into three equal shares. That does not seem to me to involve a sale of the stock. If the property consisted of an indivisible chattel, it might be necessary to sell it in order to make a division. Here the stock itself may be divided, and part of it may be transferred to the judgment debtor. The will does not impose any express obligation to sell, nor is there anything in the nature of the property which renders a sale necessary. I think that, at the

(1) L. R. 4 Ex. 154.

end of the six years, the judgment debtor would be entitled to require that his share of the stock in which the fund was invested should be transferred to him in specie. In these circumstances it appears to me that the judgment debtor has an interest in the stock which comes within the words of 3 & 4 Vict. c. 82, s. 1. I ought perhaps to refer to the fact that the will gives power to the trustees to reinvest the trust fund. There is, however, no imperative obligation upon them to alter the mode of investment, though they have a discretion to do so, if occasion arises calling for such a change. If such an occasion arises, and a change is made in the mode of investment, then the charging order will cease to have effect with regard to stock which the trustees may have transferred in order to make the change of investment. The discretion of the trustees is in no way affected by the charging order, which only extends to the interest of one of the cestuis que trust, an interest which is subject to the exercise of that discretion.

There does not appear to me to be anything in the cases to which we have been referred to the contrary of what we are deciding. The judgment in *Dixon* v. *Wrench* (1) seems to have proceeded on the ground that in that case there was an imperative obligation to convert the shares into money at a definite time, and that the only interest of the judgment debtor was in the proceeds of that conversion, and not in the shares. In *Cragg* v. *Taylor* (2) there was a trust for sale of shares, and to hold the produce of the sale upon the following trusts: first, to repay a loan made to the judgment debtor; secondly, to apply such part of the same as the trustees in their discretion should think proper to the maintenance, support, advancement, or otherwise for the benefit of the judgment debtor, his wife, and children; thirdly, without prejudice to the trusts aforesaid, to pay the income of the trust fund to the wife for life; fourthly, after her death, to hold the fund upon certain trusts for the children; and, fifthly, if none of the children attained the age of twenty-one, or married, to hold the fund in trust for the judgment debtor, his executors, administrators, and assigns. It was held that, notwithstanding the trust for sale, the

(1) L. R. 4 Ex. 154. (2) L. R. 2 Ex. 131.

C. A. 1904

BOLLAND v. YOUNG.

Stirling L.J.

judgment debtor had an interest in the shares which might be charged. Here there is no imperative trust for sale; the judgment debtor may hereafter acquire an absolute title to a portion of the stock in specie; and, so long as the stock remains unsold, he has in my opinion an interest in it. It appears to me that, under the terms of 3 & 4 Vict. c. 82, s. 1, an order may be made in this case charging the interest of the judgment debtor, whatever it may be, in this stock. For these reasons I am of opinion that this appeal should be allowed.

MATHEW L.J. I am of the same opinion. It appears to me that there is no obligation upon the trustees to sell this stock; and, when the time for distribution of the capital had arrived, the judgment debtor might elect to take his share of the fund by a transfer to him of a part of the stock in specie. I agree that the appeal should be allowed.

Appeal allowed.

Solicitor for judgment creditor: *R. Chapman.*
Solicitor for judgment debtor: *H. W. Henniker Rance.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1904
Aug. 11.

HODSON *v.* RAILWAY PASSENGERS' ASSURANCE COMPANY.

Practice — Staying Proceedings — Submission to Arbitration—Railway Passengers' Assurance Company's Acts, 1864 and 1892 (27 & 28 *Vict. c. cxxv. and* 55 & 56 *Vict. c. viii.*)—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.

The Railway Passengers' Assurance Company's Act, 1864, contained provisions by which any question arising on any contract of insurance should, if either party required it, be referred to arbitration. Sect. 33 of the Act provided that, if any policy-holder or his representatives should begin an action against the company in respect of the matters to be referred to arbitration under the provisions of the Act, the Court or a judge, on application by the company, might make an order staying all proceedings in the action. This Act was repealed by a consolidating Act of the company passed in 1892, but all contracts in force at the date of the repeal were to be valid and effectual as if the consolidating Act had not passed.

The representative of the holder of a policy issued under the Act of 1864, and containing a condition that questions arising under it should, if the company or the assured or his representatives required it, be referred to arbitration in the manner specified in the company's Act, made a claim against the company, who gave notice that they required the question to be referred to arbitration. The representative named an arbitrator to whom the company objected. No further steps were taken, and this action upon the policy was commenced. The company took out a summons to stay the proceedings in the action, and an order was made to that effect. On appeal:—

Held, that, by virtue of the reservation in the consolidating Act, there was a subsisting submission to arbitration to which s. 4 of the Arbitration Act, 1889 was applicable, and the Court or a judge had jurisdiction to make an order staying the proceedings in the action.

APPEAL from an order of a judge at chambers staying the action.

The action was brought by a widow upon a policy of insurance effected with the defendants by her husband, who met with an accident which caused his death.

The policy was made under a private Act of the defendants passed in the year 1864. By that Act—the Railway Passengers' Assurance Act, 1864 (27 & 28 Vict. c. cxxv.)—it was enacted as follows:—

"3. Any question from time to time arising on any contract

C. A. 1904

HODSON v. RAILWAY PASSENGERS' ASSURANCE COMPANY.

of insurance hereafter entered into by the company, or hereafter at the company's option renewed by them, either by their receipt of premium thereon or otherwise, whether as to the liability of the company or as to the amount or proportionate amount of compensation or otherwise, shall, if either the company or the assured or the representatives of the assured require it, be referred to arbitration under this Act."

"16. If there be any question or difference as to the liability of the company to make compensation to any holder or party or his legal representatives, or as to the amount or proportionate amount of the compensation to be made, or if there be any other question relating to the company's contract of insurance, or the incidents or consequences thereof, or any claim arising thereon, the question or difference shall, if either the company or the holder or party or his legal representatives require it, and as a condition precedent to the enforcing of any claim to which the question or difference relates, be referred to arbitration."

"33. If any holder or party or his legal representatives shall commence any action at law or suit in equity against the company in respect of the matters or any of them to be referred to arbitration under the provisions of this Act, the Court in which the action is brought, or a judge thereof, on application by the company after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why the matters cannot be or ought not to be referred to arbitration, and that the company were at the time of the bringing of the action or suit, and still are ready and willing to concur in all acts necessary and proper for causing the matters to be decided by arbitration, may make a rule or order staying all proceedings in the action or suit on such terms as to costs and otherwise as to the Court or judge seem fit."

The policy provided for payment of a certain sum to the representatives of the assured in case of his sustaining personal injury caused by accident, and such injury occasioning his death within three calendar months from the happening thereof. A condition was indorsed on the policy as follows: "Any question as to the liability of the company to pay the sum

assured by this policy in the case of fatal accident, or to make any compensation at all in case of personal injury, or as to the amount of compensation, or otherwise howsoever arising hereunder, shall, if the company or the assured or his legal representatives require it, be referred to arbitration in the manner specified in the company's Act."

Subsequently to the granting of the policy to the deceased a private Act of the company was passed. That Act—the Railway Passengers' Assurance (Consolidation) Act, 1892 (55 & 56 Vict. c. viii.)—repealed the antecedent Acts of the defendants, including the Act of 1864, but enacted as follows:—

"7. Notwithstanding such repeal as aforesaid or any other provisions of this Act—

"(A) All agreements, assurances, awards, bonds, contracts, deeds, mortgages, securities, and other acts and things made, entered into, executed, or done by or with the company or any person or persons on its behalf and in force at the date of such repeal as aforesaid, shall be as valid and effectual to all intents in favour of, against, and with reference to the company as if this Act had not been passed:

"(B) Any action, arbitration, or other proceeding or cause of proceeding pending or existing at the date of such repeal as aforesaid by, with, against, or in favour of the company or any person or persons on its behalf, shall not abate or be prejudicially affected by the passing of this Act, but on the contrary may be continued or enforced and carried on by, with, against, or in favour of the company as if this Act had not been passed."

Upon the death of the assured a claim was made by the widow as representative of the deceased, and the company gave notice early in the year 1904 that they demanded that their liability to pay the amount assured by the policy or any compensation thereunder or the amount of compensation (if any) should be referred to arbitration in the manner referred to in their Act of 1892; but this was afterwards amended to a demand for arbitration under the Act of 1864. An arbitrator was named by the plaintiff, but objected to by the defendants, who took no further steps in the matter. In July, 1904, this

C. A. 1904

HODSON v. RAILWAY PASSENGERS' ASSURANCE COMPANY.

action was commenced, but on the application of the defendants to Phillimore J. at chambers a stay was granted.

The plaintiff appealed.

M. Shearman, K.C., and *P. B. Morle*, for the plaintiff. The arbitration clauses of the earlier Act under which this policy was effected have been repealed, and consequently there is nothing to deprive the plaintiff of her right of action. Clause A of s. 7 of the Act of 1892 reserves existing contracts under the earlier Act, and Clause B reserves any existing cause of proceeding, which would include a right of action arising out of the contract. The learned judge applied s. 33 of the earlier Act to this case; but, even if it were applicable, the defendants must satisfy the Court that they were ready and willing to go to arbitration, and their taking no steps from February to July shews that they were not ready and willing. The decision in *Hodgson* v. *Railway Passengers' Assurance Co.* (1) is to the effect that the burden would lie on the plaintiff to shew that a sufficient reason existed why the dispute should not be referred to arbitration; but in *Fox* v. *Railway Passengers' Assurance Co.* (2) the former decision was not treated as laying down a universal rule, but only as applicable to the facts of the case on which it was given.

English Harrison, K.C., and *Maurice Hill*, for the defendants. The Act under which the policy was made is kept in force by s. 7 of the repealing Act in respect of all contracts in force at the time of the repeal. By s. 16 of the earlier Act a reference to arbitration is made a condition precedent to the enforcing of any claim, and no question of discretion arises as to allowing or disallowing the continuance of an action that has been commenced. Even supposing that the Act of 1864 were out of the question, the Act of 1892 is in the same terms, and leaves the right to demand an arbitration as it stood under the former Act. In any case, the Arbitration Act, 1889, is applicable, and gives the Court authority to stay the proceedings.

Shearman, K.C., in reply. There is no ground for applying

(1) (1882) 9 Q. B. D. 188. (2) (1885) 54 L. J. (Q.B.) 505.

the Act of 1892 to policies entered into before it passed; all that it did with regard to such policies was to reserve all rights under them. The only statutory right—under s. 33 of the earlier Act—to deal with an action that has been brought has been taken away, and the Arbitration Act, 1889, is not applicable, for the Act of 1864 by dealing with the matter of arbitrations impliedly excludes legislation which might otherwise be applicable.

COLLINS M.R. This is an appeal from a decision of Phillimore J. staying this action, which has been brought by the representative of the assured upon a policy made by the defendants, which at the time it was granted purported to be made under a private Act of the company dated in 1864. By one of the conditions on the back of the policy it is provided: "That any question as to the liability of the company to pay the sum assured by this policy in the case of a fatal accident, or to make any compensation at all in case of personal injury, or as to the amount of compensation or otherwise howsoever arising hereunder shall, if the company or the assured or his legal representatives require it, be referred to arbitration in the manner specified in the company's said Act." The person who was insured met with an accident in the early part of this year, and the writ was issued in July of this year to recover compensation under this policy. After the accident the company sent a formal notice to the plaintiff claiming arbitration. That notice, which is dated February 23, runs thus: "We, the undersigned directors of the Railway Assurance Company, do hereby, on behalf of the said company and in pursuance of the company's Act of Parliament (55 & 56 Vict. c. viii.), request and demand that the question as to the liability of the said company to pay the amount assured by the above-mentioned policy or any compensation thereunder, or the amount of such compensation (if any), shall be referred to arbitration in the manner prescribed by the said Act." The Act that they referred to there was the later Act, which had repealed the Act under which this policy was granted; but afterwards and before action, in answer to questions from the plaintiff as to

C. A. 1904

HODSON v. RAILWAY PASSENGERS' ASSURANCE COMPANY

Collins M.R.

what section and so on they were relying on, they mended their hand, and pointed out the sections of the earlier Act which applied to the case. Thereupon the plaintiff named an arbitrator, who for certain reasons was not acceptable to the defendants. He was named by the plaintiff as the sole arbitrator, which the plaintiff had the right to do, and the defendants might have acquiesced for all I know in a single arbitrator, but they took an objection to the particular gentleman named. Having taken this objection, they did nothing more, and on July 5 the plaintiff issued a writ. The defendants then applied to Phillimore J. to stay the action. He has stayed the action, and the appeal is now brought on the ground that the only jurisdiction which the learned judge could have to stay the action, having regard to the terms of the contract, was the jurisdiction given by the Act of 1864, and that inasmuch as that Act had been repealed, the jurisdiction to stay does not exist, and that the plaintiff is entitled to go on with her action. That is the point we have to consider; and I have come to the conclusion that the right to stay still exists. I have read the clause at the back of the policy, which was a submission to arbitration. It says that any question "shall be referred to arbitration in the manner specified in the company's said Act." Now we have to see, first of all, what is the "manner specified in the Act," and then how far that has been altered by subsequent legislation. I think, perhaps, I had better begin by reading the subsequent legislation. The section which applies most distinctly to it is s. 7 of the Act of 1892. An earlier section repeals the Act of 1864; and then comes s. 7: "Notwithstanding such repeal as aforesaid or any other provisions of this Act—(A) All agreements, assurances, awards, bonds, contracts, deeds, mortgages, securities, and other acts and things made, entered into, executed, or done by or with the company or any person or persons on its behalf and in force at the date of such repeal as aforesaid, shall be as valid and effectual to all intents in favour of, against, and with reference to the company as if this Act had not been passed." Therefore, if there was any contract subsisting at the time of the passing of the repealed statute which bound the parties to go to arbitra-

tion in a particular way, that contract is safeguarded by the very terms of the section. But then it was argued that, even if that were so, the right of action remains under Clause B, which says: "Any action, arbitration, or other proceeding or cause of proceeding pending or existing at the date of such repeal as aforesaid by, with, against, or in favour of the company or any person or persons on its behalf, shall not abate or be prejudicially affected by the passing of this Act, but on the contrary may be continued or enforced and carried on by, with, against, or in favour of the company as if this Act had not been passed." Now that appears to me, not to be a general code dealing with all possible disputes that might thereafter be the subject of arbitration, but a special enactment dealing with the special fact that there was a proceeding pending or existing at the date of the repeal of the former Act. It seems to me that does not cut down the general provision of the earlier clause which safeguards all contracts, none the less because those contracts contain in terms a provision to go to arbitration in certain circumstances. Therefore it seems to me that the contract, surviving as it does by the express words of the section, carries the obligation to go to arbitration "in the manner specified in the company's said Act." Those words bring me back to the provisions of the Act of 1864. There is, first of all, a provision in s. 3 to go to arbitration, if either the company or the assured require it, if the question of liability of the company or the question of amount arises. Then comes s. 16, which is very important. It says: "If there be any question or difference as to the liability of the company to make compensation to any holder or party or his legal representatives, or as to the amount or proportionate amount of the compensation to be made, or if there be any other question relating to the company's contract of insurance, or the incidents or consequences thereof, or any claim arising thereon, the question or difference shall, if either the company or the holder or party or his legal representatives require it, and as a condition precedent to the enforcing of any claim to which the question or difference relates, be referred to arbitration." As I have already said, I think the effect up to this point is

C. A. 1904

HODSON v. RAILWAY PASSENGERS' ASSURANCE COMPANY.

Collins M.R.

that the contract between the parties by the particular section to which I have referred is expressly safeguarded. Therefore it is made as between the parties a condition precedent to maintaining any action that an arbitration should have taken place. Then comes the section which we are told that the learned judge acted on in staying this action, and some little difficulty may technically arise on that. Sect. 33 runs thus: "If any holder or party or his legal representatives shall commence any action at law or suit in equity against the company in respect of the matters or any of them to be referred to arbitration under the provisions of this Act, the Court in which the action is brought, or a judge thereof, on application by the company after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why the matters cannot be or ought not to be referred to arbitration, and that the company were at the time of the bringing of the action or suit, and still are ready and willing to concur in all acts necessary and proper for causing the matters to be decided by arbitration, may make a rule or order staying all proceedings in the action or suit on such terms as to costs and otherwise as to the Court or judge seem fit." That section is repealed. Although the contract as between the parties might provide for arbitration, the contract of the parties is not strong enough to invest the judge with jurisdiction to order a stay, and, therefore, there might be a difficulty if there were no other means of stopping the action than that contained in s. 33 of the Act of 1864.

That being the position of affairs, I come to what is part of the general law. Sect. 4 of the Arbitration Act, 1889, is this: "If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission"—now it seems to me that so far this plaintiff is unquestionably a party to a submission—"or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that

Court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission"—he would easily be satisfied when he found that the reference was a condition precedent to bringing of the action—" and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings." It seems to me that all the necessary conditions exist for letting in the jurisdiction conferred by this section.

Then the only other point made for the plaintiff is that on the facts the defendants were not ready and willing at the time the proceedings were commenced to go to arbitration. It seems to me on that part of the case that there is no foundation for saying the defendants were unwilling. They possibly might have done more, but we have it clear that they claimed the right to arbitration. They had begun by insisting on arbitration; they had received a nomination of an arbitrator by the plaintiff; they had taken exception to that gentleman on the special ground they named in their letter; but there is nothing to shew that they would not have named another arbitrator or taken proceedings before the master in view of there being a difficulty in agreeing on a person to act as arbitrator. I do not think the mere fact that they took no steps after they had taken a particular objection to the arbitrator named affords an adequate ground for saying that they were not ready and willing to take proceedings or to do all things necessary for the proper conduct of the arbitration. On these grounds it seems to me that this appeal fails.

STIRLING L.J. I am of the same opinion, and I have nothing to add.

Appeal dismissed.

Solicitors for plaintiff: *Charles Robinson & Co., for C. W. Todd, Hull.*

Solicitors for defendants: *Bircham & Co.*

A. M.

C. A.
1904
Aug. 12.

[IN THE COURT OF APPEAL.]

WELLS *v.* ALLOTT.

Practice — Summary Judgment—Action by Money-lender — Interest primâ facie excessive—Harsh and Unconscionable Transaction—Order XIV.*— Money-lenders Act*, 1900 (63 *&* 64 *Vict. c.* 51), *s.* 1.

Where in an action by a money-lender to recover money lent with interest it appears that the interest claimed is primâ facie excessive, the case cannot, as regards the claim for interest, be dealt with upon an application for summary judgment under Order XIV., but the action must go to trial for the purpose of having it determined whether the interest is so excessive as to render the transaction harsh and unconscionable within the Money-lenders Act, 1900, and to entitle the defendant to relief under that Act.

APPEAL from an order of Phillimore J. in chambers giving the plaintiff leave to sign final judgment under Order XIV. for the amount indorsed on the writ.

The plaintiff was a money-lender. The claim indorsed on the writ was for 70*l.*, being the amount due on a promissory note, dated March 26, 1904, and made by the defendant in favour of the plaintiff, by which note the sum of 70*l.* was made payable by three consecutive quarterly instalments of 23*l.* 6*s.* 8*d.* each on the first day of each succeeding quarter, the first of such quarterly instalments to become due and payable on June 1, 1904, and it was provided that, should there be default in any one or more payments, the entire amount left unpaid should become due and payable on demand. The defendant having made default in payment of the first instalment, the plaintiff served notice upon him demanding payment of the 70*l.*, and, the demand not being complied with, the plaintiff brought this action. Upon an application under Order XIV. for leave to sign final judgment for the amount claimed, the defendant made an affidavit in which he stated that he was a clerk in holy orders, and that he was then a curate with a stipend of 150*l.* a year, which was his sole source of income; that he first borrowed money from the plaintiff on December 24,

1902, namely, the sum of 50*l.*, for which he gave a promissory note for 70*l.* payable by three quarterly instalments, and he had since borrowed two other sums of 50*l.* each on similar terms, namely, on August 27, 1903, and on March 26, 1904, and in each case he gave a promissory note for 70*l.*; that his account was a running account which had never been closed; that he had repaid to the plaintiff the sum of 140*l.* on account of the above loans by various instalments, and there was only owing to the plaintiff the sum of 10*l.* on account of principal moneys advanced, the rest of the claim being for interest; that the interest claimed and sought to be charged against him by the plaintiff was at the average rate of 105*l.* per cent. per annum, and on the particular sum which the plaintiff now claimed was at the rate of 125*l.* per cent. per annum, and that he was advised and believed that such interest was excessive, harsh, and unconscionable, and that he was entitled to relief under the Money-lenders Act, 1900; that he had offered through his solicitors before action to pay to the plaintiff the sum of 10*l.* for balance of principal due, and also interest at the rate of 5*l.* per cent. per annum on the sums advanced reckoned from the date of the several advances, but the plaintiff had refused the offer; that he intended to pay into court at once the above-mentioned sum of 10*l.*, being the balance of the moneys advanced, and 2*l.* 17*s.* 11*d.* for interest thereon at the rate of 5*l.* per cent. per annum from the date of the respective advances; that the money enabling him to pay the said sum into court and also to endeavour to settle with his other creditors had been raised by the sale of his furniture and by the assistance of relatives and friends; and that he was advised and believed that he was entitled to relief, and had a good defence so far as the claim exceeded the sum of 12*l.* 17*s.* 11*d.*

Upon this affidavit the master made an order for payment to the plaintiff's solicitors within four days of the sum of 10*l.* for principal, and interest at the rate of 5*l.* per cent. per annum on the three loans of 50*l.* each from the dates of such loans, otherwise the plaintiff to have leave to sign judgment for that amount; and he gave the defendant leave to defend as

C. A. 1904

WELLS v. ALLOTT.

to the residue. Upon appeal to the judge the plaintiff's clerk made an affidavit in reply, setting out the details of the three transactions with the defendant and the substance of the correspondence which passed between them. The affidavit stated in effect that the defendant in December, 1902, applied by letter to the plaintiff for a loan of 50*l.*, to be repaid by quarterly instalments, and after some negotiations the plaintiff advanced the 50*l.* upon receiving the promissory note for 70*l.*, dated December 24, 1902; that, when the two other promissory notes for 70*l.* each, dated respectively August 27, 1903, and March 26, 1904, were given, the defendant had himself applied by letter for the advances; that the defendant was an educated man, and that he was not only able to appreciate but did appreciate the rate of interest he was paying, as was shewn by the correspondence; and the affidavit submitted that under the circumstances the rate of interest charged was not excessive, nor was the transaction harsh and unconscionable or otherwise such that a Court of Equity would give relief, and that the transactions did not come within the Money-lenders Act, 1900, the loans being advanced without sureties and without any security whatsoever, and the interest not being at the rate of 105*l.* per cent. per annum or at the rate of 125*l.* per cent. per annum as mentioned in the defendant's affidavit. Phillimore J. discharged the order of the master, and gave the plaintiff leave to sign final judgment for the full amount claimed. The defendant appealed.

J. R. Randolph, for the defendant. The action is brought by a money-lender to recover money lent with interest, and the defendant in his affidavit states that the interest is excessive, and that he will claim relief under the Money-lenders Act, 1900. The interest is primâ facie excessive, and, when once that is shewn, the Money-lenders Act, 1900, applies, and the jurisdiction to deal with the case under Order XIV. is ousted. Under that Act the interest charged may be so excessive as of itself to render the transaction harsh and unconscionable, even in the case of a borrower of full age, and thereby to let in the jurisdiction of the Court to give relief: *In re a Debtor, Ex parte*

the Debtor. (1) Sect. 1 of the Act shews that the Court which is to determine whether relief shall be given is the Court which tries the action, and not the master or judge in chambers upon an application for summary judgment under Order XIV. The order of the learned judge was therefore wrong, and the order of the master ought to be restored.

G. Wightman Powers, for the plaintiff. The transaction here was between a money-lender and a borrower who was an educated man, and who knew exactly what he was doing and the rate of interest which he was agreeing to pay. Such a transaction cannot be described as harsh and unconscionable within the meaning of s. 1 of the Money-lenders Act, 1900, no unfair advantage being taken of the borrower by the money-lender: *Levene* v. *Greenwood*. (2) The defendant himself wrote to the plaintiff asking for the loans and offering to repay them by quarterly instalments. It was not the case of a money-lender pressing a loan upon a borrower and taking some advantage of his pecuniary position. Everything was made clear to the defendant, who knew exactly what he was agreeing to pay. The master, when he made his order, had not the affidavit of the plaintiff's clerk before him, as it was not sworn until after the master's order was made; but the learned judge had the affidavit before him, and therefore acted upon different materials when he allowed the plaintiff to sign final judgment for the amount claimed. It is clear upon the affidavits that there is no defence to the action, and the order of the learned judge is right.

Randolph was not called upon to reply.

COLLINS M.R. This is an application by the plaintiff, who is a money-lender, for leave to sign final judgment under Order XIV. for the amount of his claim against the defendant, who is a clerk in holy orders and who holds the position of a curate. The master gave the plaintiff leave to sign final judgment for the balance due in respect of the principal sums actually advanced and interest at the rate of 5*l*. per cent. per annum on the three sums of 50*l*. calculated from the dates of

(1) [1903] 1 K. B. 705. (2) (1904) 20 Times L. R. 389.

C. A. 1904

WELLS v. ALLOTT.

Collins M.R.

the respective loans, and gave the defendant leave to defend as to the rest of the claim. The plaintiff thereupon appealed to the judge, and asked for leave to sign final judgment for the whole amount of the claim. Phillimore J. held that there was no defence to the action, and he gave the plaintiff leave to sign judgment for the full amount claimed. The defendant now appeals to this Court. The question we have to determine is whether the plaintiff is entitled to judgment for the whole amount claimed under Order XIV. It seems to me that, whatever may have been the law before the passing of the Money-lenders Act, 1900, it is impossible now to say that the procedure of Order XIV. can be made applicable to an action by a money-lender to recover interest on money lent, where the loan appears primâ facie to carry an excessive rate of interest. In such a case the money-lender has not an absolute right to recover what the borrower has agreed to pay, but only a right sub modo involving an investigation by the proper tribunal for the purpose of seeing if the plaintiff's primâ facie right of action is one to which in the particular circumstances effect ought to be given. That is not, I think, a class of case which is intended to be dealt with under Order XIV. It is clear in the present case that there is primâ facie a debt due from the defendant to the plaintiff. The defendant has, however, made an affidavit which, if true, may establish a defence under the Money-lenders Act, 1900, to the greater part of the claim. The procedure under Order XIV. is meant to give a short and speedy remedy for the recovery of debts which are either admitted to be due or as to which there is no defence. But where in a particular class of case a special jurisdiction is given to the Court by the Money-lenders Act, 1900, to determine whether the plaintiff is entitled in the circumstances to recover what is a primâ facie debt, it seems to me to be clear that that class of case is taken out of Order XIV. Now s. 1, sub-s. 1, of the Money-lenders Act, 1900, is as follows: "Where proceedings are taken in any Court by a money-lender for the recovery of any money lent after the commencement of this Act, or the enforcement of any agreement or security made or taken after the commencement of this Act, in respect of money lent either

before or after the commencement of this Act, and there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief, the Court may reopen the transaction, and take an account between the money-lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest, and charges, as the Court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of money lent by the money-lender, and, if the money-lender has parted with the security, may order him to indemnify the borrower or other person sued." In the present case 150*l.* in all was advanced by the plaintiff to the defendant. Of that sum the defendant has repaid 140*l.*, leaving a balance unpaid of 10*l.* in respect of principal. The action is brought to recover a sum of 70*l.* As I have already said, the master, upon an application under Order XIV., thought that the defendant should pay to the plaintiff the sum of 10*l.* and interest at the rate of 5*l.* per cent. per annum upon the sums advanced from the dates of the respective advances—a course which the defendant expressed his willingness to adopt; and he accordingly gave the plaintiff leave to sign judgment for those amounts, and gave the defendant leave to defend as to the residue of the claim; but Phillimore J. discharged this order of the master, and gave the plaintiff leave to sign final judgment for the total amount claimed. For the reasons which I have given above, and following the reasoning of the decision of this Court in *In re*

C. A. 1904

WELLS v. ALLOTT.

Collins M.R.

a Debtor, Ex parte the Debtor (1), it seems to me that upon the allegations contained in the defendant's affidavit the present transaction is brought within the Money-lenders Act, 1900, so far as to involve the necessity for an investigation, and is therefore taken out of Order XIV. It is the case of a loan by a money-lender, and a very large rate of interest is charged, whether it amounts to 105*l.* or 125*l.* per cent. per annum, as the defendant asserts, or to a lower rate, as the plaintiff asserts. The case involves an investigation under the Act of 1900, and the judge at chambers exercising jurisdiction under Order XIV. is not the proper tribunal to make that investigation. The proper tribunal to conduct the investigation is the tribunal which tries the action, and which will have the witnesses before it. For these reasons I think the learned judge ought not to have given judgment under Order XIV., and his order must be reversed and the order of the master restored.

COZENS-HARDY L.J. I entirely agree with all that the Master of the Rolls has said. This is not the class of case that can be dealt with under Order XIV. The Money-lenders Act, 1900, has introduced an entirely new element into every case which falls within its provisions. Where the interest appears on the face of the transaction to be excessive, whether it is 100 per cent. or less, the further inquiry has to be undertaken, namely, whether the interest is so excessive as to make the transaction harsh and unconscionable. That inquiry must be made, not upon an application for summary judgment under Order XIV., but before a tribunal which has the parties and the witnesses before it. The learned judge at chambers has overlooked what fell from the Master of the Rolls in giving judgment in *In re a Debtor, Ex parte the Debtor* (1), where he deals with the very question whether excessive interest may not of itself render the transaction harsh and unconscionable within the meaning of the Act. He said: "Relief may be given if the bargain is harsh and unconscionable by reason of excessive interest or other excessive charges. Before the Act the Courts of Equity used to give relief in special cases when

(1) [1903] 1 K. B. 705.

the parties stood in a particular relation to each other, or upon the ground of fraud or undue pressure upon the borrower, but they did not regard excessive interest alone as a ground for setting aside a bargain in the absence of some particular relation between the parties, as, for instance, if the borrower was an expectant heir. I will not say that under this section the interest charged and the other charges made might not be so excessive as to render the bargain harsh and unconscionable, even as against a borrower who was of full age and who stood in no special relation to the lender." The other members of the Court concurred in that view. In arriving at this conclusion I express no opinion as to what should be the result of the action. I express no opinion whether the Court ought or ought not in the circumstances of the present case to give relief under the Act. I only decide that it is not a case for summary judgment under Order XIV.

Appeal allowed.

Solicitors for plaintiff: *Bennett & Ferris, for Bray & Price, Leicester.*

Solicitors for defendant: *Pritchard, Englefield & Co., for Elliott & Elliott, Manchester.*

E. L.

C. A.
1904
Oct. 24.

[IN THE COURT OF APPEAL.]

ALDRICH *v.* BRITISH GRIFFIN CHILLED IRON AND STEEL COMPANY, LIMITED.

Practice—Security for Costs—Bond of Foreign Company.

There is no general rule to the effect that the bond of a foreign company will never be regarded as a sufficient security for costs.

APPEAL against an order made by Phillimore J. at chambers as after mentioned.

This action was brought by a person, who was a subject of, and resident in, the United States, as the trustee in bankruptcy of an American company. An order having been made for security for costs to the amount of 80*l.*, the plaintiff tendered as security for that amount the bond of an American company, called the Fidelity and Deposit Company of Maryland. This company, whose business it was to insure the fidelity of persons holding places of trust or responsibility, and to become sureties for the due performance of contracts and in respect of other matters, had a branch office in London, and had transferred into the names of three trustees, namely, Lord Revelstoke, Sir Clinton Edward Dawkins, and Mr. John Pierpont Morgan, junior, of whom the first mentioned was resident in England, a sum of 53,675*l.* New Consols upon certain trusts declared by deed to secure due payment of guarantee bonds issued by the company in the United Kingdom. By the terms of the trust deed the trust fund could only be invested in such investments as were authorized by English law for the time being for the investment of trust funds, and no part of the trust fund was to be paid or transferred to the company or its assigns, until it had been proved to the reasonable satisfaction of the trustees that there was no guarantee bond issued by the company in the United Kingdom outstanding and unprovided for, and in the meantime the trust fund was to remain subject to the trusts declared by the

deed for the benefit of the holders of the guarantee bonds of the company. The trust deed provided that, in the event of the trustees having to apply any of the trust fund in order to meet guarantee bonds, the company should within one calendar month cause to be transferred to the trustees investments approved by them similar in character to those so applied and of the same market value. It appeared that the Fidelity and Deposit Company of Maryland had been admitted on the list of companies whose guarantees were accepted by the Board of Trade for official receivers, special managers, trustees in bankruptcy, and others, and that the company had been accepted by the Admiralty as surety in the case of large shipbuilding contracts. The defendants objected to the security tendered, and, on application to the master, he, after consultation with the other masters of the King's Bench Division, refused to accept the security on the ground that, as a general rule of practice, a bond given by a foreign company could not be forced upon an unwilling party as a security for costs. On appeal by the plaintiff to Phillimore J., that learned judge, in substance, said that he was of opinion that the company whose bond was tendered as security in the particular case was a good, sound company, having valuable assets in the hands of trustees in England, to remove which out of the jurisdiction would be a breach of faith with its clients and would possibly imply a breach of trust by the trustees, and he suggested that it would be possible to make it a term of acceptance of the security that the company should agree to submit to the jurisdiction of the English Courts in respect of the bond, and give an address for service of process in this country; but he thought that there should be a general rule on the matter, and, having regard to difficulties which might arise in such cases, the rule ought to be as laid down by the masters of the King's Bench Division. He therefore dismissed the appeal.

J. E. Bankes, K.C., Llewelyn Davies with him, for the plaintiff. There is abundant evidence of the solvency of the company whose bond is tendered as security, and that

C. A. 1904

ALDRICH v. BRITISH GRIFFIN CHILLED IRON AND STEEL COMPANY.

the payment of the bond is secured by funds in the hands of trustees in this country; and any difficulties which might arise with regard to putting the bond in suit against a foreign company might, as the learned judge at chambers pointed out, be met by making it a condition of accepting the security that the company should agree to submit to the jurisdiction of the English Courts in respect of the bond, and to accept service of process at some address in this country. The learned judge seems to have been satisfied that in point of fact the bond tendered would have been sufficient security in the particular case, but he acted on a supposed general rule that the bond of a foreign company resident out of the jurisdiction ought not to be accepted as a sufficient security for costs. It is submitted that there is no such general rule, and that the question whether such a bond should be accepted as security ought to depend on the circumstances of the particular case. [He referred to a case of *In re Goldfields of Venezuela* (1), heard in Appeal Court No. 2.]

R. J. Neville, for the defendants. Under Order LXV., r. 7, where a bond is to be given as security for costs, the bond is to be given to the party or person requiring the security, and not to an officer of the Court. If the security had to be given to the satisfaction of the master, there is no doubt that there would be no appeal from his finding, if he found that the security was sufficient; but under Order LXV., r. 7, the security tendered must be such that the party to whom it is tendered ought in reason to be satisfied with it. The question is whether the bond of a foreign company ought to be forced upon an unwilling party as security. It is submitted that, having regard to the difficulties which would arise in ascertaining the solvency and position of foreign companies, and in enforcing a bond against them, a defendant ought not to be compelled to take such a security. It appears to have been the practice at chambers not to compel defendants to accept such a security.

(1) Not reported. In that case the question seems to have arisen with regard to the security to be given by the receiver appointed in a receivership action by debenture-holders. The result of the case is sufficiently indicated in the judgment of Stirling L.J.

J. E. Bankes, K.C., for the plaintiff, was not called on to reply.

EARL OF HALSBURY L.C. This matter seems to me a very plain one. The question is whether the security tendered in this case is a sufficient security for the amount of 80*l*. When the question whether the security tendered in a particular case is in fact sufficient comes before a master for determination, it may no doubt be material to consider the matters which have been put forward by the counsel for the defendants in relation to the circumstances of the particular case; but it appears to me that it would be wrong to lay it down as a general proposition applicable in all such cases that the bond of a foreign company can never be accepted as a sufficient security. Each case of the kind must depend on its own particular circumstances. As regards some foreign companies, and under some circumstances, a master might well be justified in refusing to accept the bond of a foreign company as a security, but I cannot agree that there should be any general rule such as is suggested. In the particular circumstances of the present case the learned judge seems to have thought that the security was in point of fact ample, but he appears to have acted on a supposed general rule of practice in refusing to accept it. In my opinion there is no such general rule, and therefore the appeal must be allowed.

STIRLING L.J. I am of the same opinion. I entirely agree that there is no such general rule of practice as is contended for by the defendants. The matter has within my own knowledge been at various times considered by judges of the Chancery Division, and in the case which was referred to by the plaintiff's counsel it came before the Court of Appeal. In that case Farwell J., who had decided the matter in the Court below, reported to the Court that he had decided the case on the merits, and not on any assumption of the existence of any particular rule, and, that being so, the appeal was dismissed; but Vaughan Williams L.J. suggested that the judges of the Chancery Division should consider whether any general rule

C. A. 1904

ALDRICH v. BRITISH GRIFFIN CHILLED IRON AND STEEL COMPANY.

Stirling L.J.

of practice on the subject could be arrived at and promulgated. I believe the judges of the Chancery Division did consider the question, but could not arrive at any general rule with regard to the acceptance of the security of foreign companies; so the practice remained as it was before, namely, that each case must be decided upon its own facts. In the present case the learned judge below seems to have decided on the assumption of the existence of some general rule, which does not appear to me to exist.

MATHEW L.J. I agree. There does not appear to be any authority for the existence of any general rule on the subject.

Appeal allowed. (1)

Solicitors for plaintiff: *Bennett & Ferris.*
Solicitors for defendants: *Radcliffe & Co.*

(1) Counsel for the defendants contended that, the case having been decided below on the supposed existence of a general rule on the subject, the matter ought to be referred back to the master for further inquiry into the position of the company. The Court, however, having regard to the amount involved, declined to accede to this application, but said that, if an application should be subsequently made for increase of the security, the defendants would not be precluded from raising any objection which might be open to them.

E. L.

SCOTT, APPELLANT *v.* PILLINER, RESPONDENT. 1904 *July* 12.

Local Authority—By-law—Validity—Reasonableness—Prohibition of Sale of Papers devoted to Racing Tips.

A by-law made by a county council imposed a penalty on any person frequenting and using any street or public place "for the purpose of selling or distributing any paper or written or printed matter devoted wholly or mainly to giving information as to the probable result of races, steeplechases, or other competitions."

Held (by Lord Alverstone C.J. and Kennedy J., Phillimore J. dissenting), that the by-law was unreasonable and could not be supported.

CASE stated by justices.

The appellant was charged on information with having frequented a certain street or public place in the county of Stafford, not being part of a municipal borough, for the purpose of selling a newspaper devoted wholly or mainly to giving information as to the probable result of races, contrary to a by-law made by the county council of Staffordshire for the good rule and government of the administrative county of Stafford other than municipal boroughs. The by-law was in the following terms:—

"Sale of Racing Tips.

"No person shall frequent and use any street or other public place, either on behalf of himself or of any other person, for the purpose of selling or distributing any paper or written or printed matter devoted wholly or mainly to giving information as to the probable result of races, steeplechases, or other competitions. Every person contravening any of the foregoing provisions shall be liable to a penalty not exceeding 5*l.*"

The justices convicted the appellant and fined him 5*l.*, but stated this case for the opinion of the Court on the question whether the by-law was properly made by the county council and was valid and reasonable.

Danckwerts, K.C. (*J. S. Pritchett* with him), for the appellant. The by-law is invalid for unreasonableness and cannot

1904

SCOTT v. PILLINER.

be supported. The county council only has power to make by-laws for two objects: for the good rule and government of the district, and for the prevention and suppression of nuisances. The objects of this by-law are clearly to prevent the circulation of what are known as racing tips, and it therefore creates a new offence. It is altogether too wide in its terms, and would apply to a perfectly innocent sale of a paper devoted mainly to discussing the chances of competitors in any athletic contest. The county council cannot prohibit things which may be bad in themselves but are not illegal: *Macdonald* v. *Lochrane*. (1) This by-law is quite different from that which was held to be good in *Thomas* v. *Sutters* (2), and goes much too far.

Avory, K.C. (*Shakspeare* with him), for the respondent. The by-law is not unreasonable. It must be for the good rule and government of the district that the sale of papers devoted to sporting tips, and so inciting to betting, should be prohibited. In *Thomas* v. *Sutters* (2) a by-law forbidding persons to frequent or use any street for the purpose of betting or agreeing to bet was held good, and there is but little difference between doing so and selling racing tips, and thus inducing people to bet. The Court will be slow to hold a by-law void for unreasonableness: *Kruse* v. *Johnson*. (3)

PHILLIMORE J. I regret to differ from the other members of the Court, but I have long held the opinion that at times Courts have been too astute in finding grounds for holding by-laws to be invalid. Parliament has deliberately given additional powers to county councils and other local authorities for the good government of their respective districts. Parliament no doubt itself legislates for the general good government of the United Kingdom; but that does not seem to me to prevent the local authorities from exercising the powers given to them to deal with their particular areas, and if additional provisions are necessary for the good government of those areas I think we ought not to interfere. It seems to me that it may very well be that street betting is facilitated by the sale of such

(1) (1887) 51 J. P. 629. (2) [1900] 1 Ch. 10.
(3) [1898] 2 Q. B. 91.

papers as this, whose only cause of existence and only reason for sale is that they appear to give information as to the probable results of races and other competitions. I think that this by-law is reasonable, or at any rate that it is not unreasonable, and that it is within the power of the county council to make it, and that it ought to be supported.

KENNEDY J. I feel obliged to come to a different conclusion. This by-law is framed for the purpose of subjecting to penalties persons who "frequent and use any street or other public place for the purpose of selling or distributing any paper or written or printed matter devoted wholly or mainly to giving information as to the probable result of races, steeplechases, or other competitions." It seems to me that we must endeavour to construe such a by-law entirely on legal principle, and apart from any consideration of what might be desirable as new legislation. That which renders a person liable to a penalty under this by-law is the selling or distributing of written or printed matter "devoted wholly or mainly to giving information as to the probable result of races, steeplechases, or other competitions." Now it cannot be disputed that such information may be given without any breach of the law at all. It is not, in itself, immoral. It is not necessarily information as to bets, or as to where they may be made. It is harmless to most people. The words are wide enough to include information as to the probable result of any athletic contest.

I should be slow to think that it was reasonable to penalise the sale or distribution of papers giving information as to these things merely because those who buy such a paper will have an additional opportunity of getting knowledge or suggestions which may lead them to make bets. One may have a strong view as to the mischief of betting, but one's objection to betting ought not to govern the decision of this case. The question for us is whether it is reasonable for the county authority to penalise the sale or distribution of such newspapers or other documents as may be held to come within the very wide description given in the by-law.

1904

SCOTT v. PILLINER.

Kennedy J.

We must, I think, deal with the question on broad grounds. I quite agree with my brother Phillimore as to the large liberty which ought to be given to local authorities to make by-laws for the good government of their districts; but I think it is going too far to say that a by-law which makes the sale or distribution of papers unlawful (independently of any question of nuisance) merely because the bulk of the information contained in those papers may help or tempt persons to make bets, is reasonable and ought to be so held by this Court.

LORD ALVERSTONE C.J. I also think that the by-law cannot be supported. As to the principle enunciated by my brother Phillimore, I have always recognised and given effect to it. I think that this Court ought not to interfere with a by-law made by a local authority if it can be supported on reasonable grounds; but I also think that it is desirable for the good government of a locality that by-laws should be clear and definite and free from ambiguity, and also that such by-laws should not make unlawful things which are otherwise innocent. Of course a local authority may make a by-law for stopping street betting by means of tipsters, and if that was all that this by-law did it would, in my opinion, be valid. I do not wish to be understood to say that a by-law cannot be made to that effect. But it seems to me that the main objection to this by-law is that it is too wide, and that it would include cases where the sale of the paper was not in aid of street betting or of any betting at all.

If the paper were conducted or the office of the paper were used on behalf of persons carrying on street betting as a fact, then a by-law striking at the evil might be perfectly reasonable; but the by-law in its present form brings within its purview papers which may be found to be mainly devoted to giving information as to the probable results of competitions on which there might be no betting at all. There may be perfectly innocent sales of such papers, and their publication and distribution might not conduce to any betting offence at all, and yet they would fall within this by-law. I think,

however, that a by-law might be framed so as to hit the real mischief, and so as to be confined to it.

Therefore, both on the ground of uncertainty, and mainly on the ground that it may strike at perfectly innocent sales of papers, I think that this by-law is bad and cannot be supported. The appeal must therefore be allowed.

Appeal allowed.

1904

SCOTT v. PILLINER.

Lord Alverstone C.J.

Solicitors for appellant: *Judge & Priestley, for Philip Baker, Birmingham.*

Solicitor for respondent: *H. M. Davis, for Hand & Co., Stafford.*

A. P. P. K.

THE KING, APPELLANT *v.* ABRAHAMS, RESPONDENT.

1904

July 14.

Merchant Shipping Act — "Crimping" — Foreign Ship — End of Voyage — Merchant Seamen (Payment of Wages and Rating) Act, 1880 (43 & 44 *Vict. c.* 16), *ss.* 5, 6—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 218, 219.

Notwithstanding the difference in language, the provisions of s. 219 of the Merchant Shipping Act, 1894, are the same as those of s. 6 of the Merchant Seamen (Payment of Wages and Rating) Act, 1880, and therefore, where an Order in Council under the Act of 1880 declared that the provisions of s. 5 of that Act relating to "crimping" should apply to ships of a foreign country, those provisions have effect as if the ships of that country were British ships arriving, about to arrive, or which had arrived at the end of their voyage.

CASE stated by a metropolitan police magistrate.

On December 22, 1903, complaint was made by the appellant on behalf of the Board of Trade against the respondent for that the respondent at Limehouse Basin, not then being in His Majesty's service, and not being duly authorized by law for the purpose, unlawfully did go on board the Norwegian ship the *Sognedalen*, then being within British territorial jurisdiction, without the permission of the master of the said ship, contrary to ss. 218 and 219 of the Merchant Shipping Act, 1894, and to an Order in Council dated October 25, 1881.

The following facts were found by the magistrate:—

The Norwegian ship *Sognedalen* of Frederikstad arrived from

1904

REX v. ABRAHAMS.

that port at Limehouse Basin, in the port of London, within British territorial jurisdiction, on December 18, 1903.

On the same day the respondent, who was not a person in His Majesty's service nor was duly authorized by law for the purpose, went on board the said ship without the permission of the master before the seamen lawfully left the said ship at the end of their engagement or were discharged.

The agreement relating to the service of the crew on board the said ship, rendered into the English language, was as follows: "Crew list for barque *Sognedalen*, belonging to Frederikstad, of 596 tons register, bound from here to London and further." (1)

(1) By the Merchant Seamen (Payment of Wages and Rating) Act, 1880 (43 & 44 Vict. c. 16), s. 5, "Where a ship is about to arrive, is arriving, or has arrived at the end of her voyage, every person, not being in Her Majesty's service or not being duly authorized by law for the purpose, who—

"(*a*) goes on board the ship, without the permission of the master, before the seamen lawfully leave the ship at the end of their engagement, or are discharged (whichever last happens);

shall for every such offence be liable on summary conviction to a fine"

By s. 6, "Whenever it is made to appear to Her Majesty

"(1.) That the Government of any foreign country has provided that unauthorized persons going on board of British ships which are about to arrive or have arrived within its territorial jurisdiction shall be subject to provisions similar to the provisions contained in the last preceding section as applicable to persons going on board British ships at the end of their voyages; and

"(2.) That the Government of such foreign country is desirous that the provisions of the said section shall apply to unauthorized persons going on board of ships belonging to such foreign country within the limits of British territorial jurisdiction;

Her Majesty may, by Order in Council, declare that the provisions of the said last preceding section shall apply to the ships of such country; and thereupon so long as the Order remains in force those provisions shall apply and have effect as if the ships of such country were British ships arriving, about to arrive, or which had arrived at the end of their voyage."

By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 5 and 6 of the Merchant Seamen (Payment of Wages and Rating) Act, 1880, are repealed, and by s. 218: "Where a ship is about to arrive, is arriving, or has arrived at the end of her voyage, and any person, not being in Her Majesty's service or not being duly authorized by law for the purpose,—

"(*a*) goes on board the ship, without the permission of the master, before the seamen lawfully leave the ship at the end of their engagement, or are

It was contended on behalf of the respondent that as the crew had signed for a voyage "to London and further" the *Sognedalen* had not arrived at the end of her voyage within the meaning of ss. 218 and 219 of the Merchant Shipping Act, 1894, for that the voyage therein mentioned must be construed to mean the full or round voyage for which the crew had agreed to serve, and on the completion of which they would be paid off, and not as the ship's passage from one port to another, and that therefore no offence had been committed by the respondent.

The magistrate held that the words "end of their voyage" in s. 219 of the Merchant Shipping Act must be held to mean,

discharged (whichever last happens)

that person shall for each offence be liable to a fine."

By s. 219, "Whenever it is made to appear to Her Majesty that the Government of a foreign country

"(*a*) has provided that unauthorized persons going on board British ships which are about to arrive or have arrived within its territorial jurisdiction shall be subject to provisions similar to those of the last preceding section which are applicable to persons going on board British ships at the end of their voyages; and

"(*b*) is desirous that the provisions of the said section shall apply to unauthorized persons going on board ships of that foreign country within British territorial jurisdiction,

Her Majesty in Council may order that those provisions shall apply to the ships of that foreign country, and have effect as if the ships of that country arriving, about to arrive, or having arrived at the end of their voyage, were British ships."

By s. 745, "(*a*) Any Order in Council made under any enactment hereby repealed shall continue in force as if it had been made under this Act. . . .

"(*c*) Any document referring to any Act or enactment hereby repealed shall be construed to refer to this Act, or to the corresponding enactment of this Act."

By an Order in Council dated October 25, 1881, reciting s. 5 of the Merchant Seamen (Payment of Wages and Rating) Act, 1880, and that it had been made to appear to Her Majesty that the Government of Sweden and Norway had provided as aforesaid, and was desirous that the provisions of s. 5 should apply to unauthorized persons going on board of Swedish and Norwegian ships within the limits of British territorial jurisdiction, it was provided: "Now, therefore, Her Majesty, by virtue of the power vested in her by the said recited Act, and by and with the advice of Her Privy Council, is pleased to declare that the provisions of the said recited 5th section of the Merchant Seamen (Payment of Wages and Rating) Act, 1880, shall apply to Swedish and Norwegian ships."

1904

REX v. ABRAHAMS.

both as regards British and foreign ships, the completion of that voyage for which the crew had signed articles, and on the completion of which they would be paid off; and as the crew of the *Sognedalen* had signed articles for a voyage "to London and further" the arrival of that vessel at Limehouse Basin, although within British territorial jurisdiction, was not an arrival at the end of her voyage within the meaning of s. 219 of the Merchant Shipping Act, 1894, and that consequently no offence had been committed contrary to the provisions of s. 218 of the said Act; and he accordingly dismissed the complaint, and stated this case for the opinion of the Divisional Court.

The Attorney-General (*Sir R. B. Finlay, K.C.*), (*H. Sutton* and *Howard Smith* with him), for the appellant. The magistrate has taken too narrow a view. The Merchant Shipping Act, 1894, is a consolidation statute, and where the language is ambiguous regard must be had to the previous statute. It is plain that by ss. 5 and 6 of the Act of 1880 it was intended that the provisions of the Act, when applied by an Order in Council, were to relate to a foreign ship coming into a British port as if it were ending its voyage there. It cannot have been intended by s. 219 of the Act of 1894 to limit the application of the section to foreign ships actually ending their voyage in British ports. To do so would materially limit a most beneficial provision.

Colam, for the respondent. The object of the sections was to prevent crimping—that is to say, getting hold of seamen who have just been paid off. When a foreign vessel merely calls at a British port the men are not paid off, and they are therefore in no need of the protection of the Act. This is clearly the case in regard to British ships calling at British ports, and s. 219 and the Order in Council make the provisions of the sections apply to Norwegian ships as if they were British ships. The Order in Council, although kept alive, must be construed in reference to s. 219 of the Act of 1894, and not to s. 6 of the Act of 1880.

LORD ALVERSTONE C.J. I am of opinion that the view taken by the learned magistrate in this case is too narrow. It

may be necessary in some other case to consider the question whether the Order in Council being the record of an agreement with a foreign country under the Act of 1880, and kept alive by the Act of 1894, is still valid. It is, however, contended that, the construction of s. 219 being narrower than that of s. 6 of the Act of 1880, the Order in Council must be construed with reference to it. I do not wish to base my decision on the Order in Council only, because I think that the Attorney-General is right upon the construction of s. 219; but I must not be understood to accede to the contention that an Order in Council validly made for the purpose of applying the Act of 1880 and dealing with foreign ships could be a bad order because there had been legislation in 1894. If the language of s. 219 in the Act of 1894 had been quite clear, it is not suggested that we can put a different construction upon it merely because the Act is a consolidation Act; but the contention is, and to that extent I think it is well founded, that in a consolidation Act, where there are ambiguous expressions, regard may be had to the previous Act of Parliament in pari materiâ for the purpose of interpreting those ambiguous expressions. With regard to s. 6 of the Act of 1880, I do not think there can be any doubt that a foreign ship coming into British territorial waters was to be deemed to be a British ship which was ending her voyage. It is said that the latter part of s. 219 has altered that. I need not read again the two sub-sections of s. 219, because they correspond with sub-ss. 1 and 2 of s. 6 of the Act of 1880. I only desire to point out that the conditions on which an Order in Council may be made are still the same, and that it must be shewn first that a foreign country has prohibited unauthorized persons going on British ships which are about to arrive or have arrived within its territorial jurisdiction (nothing being there said about such vessels being at the end of their voyages), and, further, that the foreign country is desirous that "the provision of the said section shall apply to unauthorized persons going on board ships of that foreign country within British territorial jurisdiction." Again, nothing is said about the vessel ending her voyage there. Those being the governing principles of the sections of both

1904

REX v. ABRAHAMS.

Lord Alverstone C.J.

Acts, the protection afforded to British ships by the foreign country, and to foreign ships by the Order in Council, would probably be reciprocal and co-extensive. I cannot for a moment think that it ever could have been supposed that the protection of the section was only to be applied to the case of the foreign ship which was in fact to end that particular voyage in the United Kingdom.

Sect. 219 further provides: "Her Majesty in Council may order that those provisions shall apply to the ships of that foreign country, and have effect as if the ships of that country arriving, about to arrive, or having arrived at the end of their voyage, were British ships." In my opinion s. 219, although not so clearly stated as s. 6 of the Act of 1880, means that the foreign ship coming into British territorial waters is to be treated as a British ship ending her voyage, and, of course, it is quite possible also to read the word "voyage" as indicating a voyage or transit to British territory, notwithstanding the fact that when the foreign vessel goes out again she will go under the same contractual relation in regard to its seamen as before. But whatever view we take of the section, whether as regards the arriving of a British ship within foreign territorial jurisdiction or of a foreign ship within British territorial waters, I think that the words "the ships of that country arriving, about to arrive, or having arrived" were intended to shew that the foreign ships intended to be brought within the scope of legislation were those arriving at the end of their passage to this country. I therefore think that s. 219, fairly construed, has the same effect as s. 6 of the Act of 1880; and it is admitted that if so the Attorney-General's contention is correct. I think that the appeal must be allowed, and the case must be remitted to the magistrate with a direction to convict.

KENNEDY J. I am of the same opinion, and I only desire to add one sentence—that any other construction than that which we adopt, it seems to me, would practically nullify the earlier parts of the same section as to British ships in which mention is made of the provisions to be made applicable by

the government of a foreign country to British ships which are about to arrive or have arrived in the territorial jurisdiction of a foreign country.

PHILLIMORE J. I agree in the decision of the Court and in the expressions of my Lord. With regard to the probable continuance in force of the Order in Council, it is not necessary to decide that to-day. I suspect that the reason why there is no provision in regard to British ships which are not ending their voyage is because other sections of the Act enable a master to reclaim, if necessary by force, a seaman abandoning his ship improperly during a voyage. The law will always protect British ships during their touching at British ports; but there is probably no similar protection, at any rate equally efficacious, accorded to foreign masters, and there is no equal protection accorded to British shipmasters in foreign countries. Therefore it is desirable, when dealing with a British shipmaster touching at the port of a foreign country or a foreign shipmaster coming to an English port, that this provision should apply. The end of the voyage means, in my opinion, for this purpose the end of the voyage into British territorial waters.

Case remitted to magistrate.

Solicitor for appellant: *Solicitor to Board of Trade.*
Solicitors for respondent: *C. V. Young & Son.*

A. P. P. K.

1904
July 14.

THE KING, APPELLANT *v.* GOLDBERG, RESPONDENT.

Merchant Shipping Act—Summary Jurisdiction—"Crimping"—Right of Accused to be tried by a Jury—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 218, 680, *sub-s.* (*b*)—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 17.

A person charged with the offence of "crimping" under s. 218 of the Merchant Shipping Act, 1894, has a right to claim to be tried by a jury.

CASE stated by the stipendiary magistrate for the borough of West Ham.

"An information laid on behalf of the appellant charged that the respondent, who was a tailor, on May 30, 1904, in the borough of West Ham, not then being in His Majesty's service, and not being duly authorized by law for the purpose, did unlawfully go on board the British ship *Acanthus*, lying at D Jetty, Victoria Dock, which said vessel had arrived at the end of her voyage, without the permission of the master of the said ship, before the seamen lawfully left the ship at the end of their engagement or were discharged, contrary to the form of the statute in such case made and provided (s. 218 of the Merchant Shipping Act, 1894).

"On the hearing of the information before me on June 2, 1904, as it appeared to me that the respondent was liable on summary conviction of the offence to be imprisoned in the first instance for a term exceeding three months, after the charge had been read to him and before the same was gone into, I addressed him to the following effect, as required by s. 17 of the Summary Jurisdiction Act, 1879: 'You are charged with an offence in respect of the commission of which you are entitled, if you desire it, instead of being dealt with summarily, to be tried by a jury. Do you desire to be tried by a jury?' And I added to such address the statement suggested by the section. The respondent, who was not represented, claimed to be so tried.

"Upon this, counsel for and on behalf of the appellant

objected to the option being given to the respondent of being tried by a jury. In support of his objection he contended that s. 680, sub-s. (*b*), of the Merchant Shipping Act, 1894, which prescribes the manner of prosecution of offences against s. 218 of the said Act, required that the charge must be dealt with summarily, and that I ought, therefore, to hear the case, and not send it to the borough sessions; and that any provisions of the Summary Jurisdiction Acts which give an option to the defendant in certain cases to claim to be tried by a jury did not apply to prosecutions governed by s. 680, sub-s. (*b*), of the said Merchant Shipping Act.

"I overruled his objection because I was of opinion that, as s. 680, sub-s. (*b*), of the Merchant Shipping Act directed that the offence should be prosecuted summarily in manner prescribed by the Summary Jurisdiction Acts, such Acts applied in their entirety to this prosecution, and that s. 17 of the Summary Jurisdiction Act, 1879, laid imperatively on me the duty of informing the respondent of his right to a trial by a judge and jury. I therefore ruled that the respondent was entitled to be tried by a jury.

"The evidence for the appellant was then heard by me; and on that evidence I committed the respondent to trial at the adjourned borough sessions, and I bound him over in his own recognizances in 20*l.* to appear at the sessions.

"The question for the opinion of the Court is, Whether upon the facts stated I was right in determining that the respondent was entitled to claim the right to be tried by a jury under s. 17 of the Summary Jurisdiction Act, 1879, and in committing him to take his trial at the said adjourned sessions for the borough of West Ham, or whether I ought to have heard the case summarily without giving him the option to go for trial.

"If the Court should be of opinion that I was right, then the committal to the sessions is to stand; but if I was wrong in determining that the respondent was entitled to be tried by a jury, and that I ought to have heard the case summarily, the Court will be pleased to remit the case to me with such directions as it may think fit to give, or to

1904

REX v. GOLDBERG.

make such other order in the matter as the Court may think fit." (1)

The Attorney-General (*Sir R. B. Finlay, K.C.*), (*H. Sutton* and *H. Stuart Moore* with him), for the appellant. The magistrate was wrong. It is important that the offences created by the Merchant Shipping Acts should be dealt with speedily, as the witnesses, who are for the most part seamen, are likely to be at sea again very shortly. Sect. 680 (*b*) therefore directs that such offences "shall" be prosecuted summarily. The magistrate, by allowing the prisoner the benefit of s. 17 of the Summary Jurisdiction Act, 1879, has limited this word "shall," and made it read as though it were "shall if the prisoner consent" be prosecuted summarily.

Colam, for the respondent. The section is necessary to enable offences under the Act to be dealt with summarily at all. Otherwise they must be tried by indictment. There is nothing in the Act to support the contention that s. 17 of the Summary Jurisdiction Act, 1879, is not to apply. The word "shall" is not so imperative as to override it; but the section distinctly provides that the prosecution is to be conducted in manner provided by the Summary Jurisdiction Acts.

[He was stopped.]

(1) By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 218, "Where a ship is about to arrive, is arriving, or has arrived at the end of her voyage, and any person, not being in Her Majesty's service, or not being duly authorized by law for the purpose,

"(*a*) goes on board the ship, without the permission of the master, before the seamen lawfully leave the ship at the end of their engagement, or are discharged

that person shall for each offence be liable at the discretion of the Court, to imprisonment for any term not exceeding six months. . . ."

By s. 680 (*b*), "An offence under this Act made punishable with imprisonment for any term not exceeding six months shall be prosecuted summarily in manner provided by the Summary Jurisdiction Acts."

By s. 17 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), "A person when charged before a Court of summary jurisdiction with an offence, in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months, and which is not an assault, may on appearing before the Court and before the charge is gone into, but not afterwards, claim to be tried by a jury."

1904

REX v. GOLDBERG.

LORD ALVERSTONE C.J. The point raised is one of importance, and I can see many grounds for thinking that it might be desirable that there should be legislation to enable certain offences under the Merchant Shipping Act to be dealt with in a summary manner; but it seems to me that such an enactment would require clearer language than is used in s. 680 of the Act of 1894. When the Act of 1894 was passed, the procedure of the Summary Jurisdiction Act of 1879 was in existence and was well known, and s. 17 of the Act of 1879 gives a right to any person charged before a Court with an offence for which he can be imprisoned for more than three months to demand trial by jury. The section further provides for his being addressed by the Court in regard to this. Sect. 218 of the Act of 1894 has provided that a person committing an offence against the section is to be liable at the discretion of the Court to imprisonment for any term not exceeding six months. The Act provides by s. 680 that the offence under the Act punishable with imprisonment for any term not exceeding six months "shall be prosecuted summarily in manner provided by the Summary Jurisdiction Acts"—in other words, the proceedings shall be commenced in the way contemplated by these Acts. The Attorney-General has pressed upon us that the words "shall be prosecuted summarily" mean that the prisoner or person charged is not to get the benefit of s. 17, but that the prosecution must go on to the end summarily. However desirable that may be—and I do not deny that it may be desirable—I think that, in a matter having reference to a code of criminal prosecution which is imported by reference, it requires stronger words to deprive a person of a right which has been given him by s. 17 to claim to be tried by a jury. I cannot think myself that the word "shall" in s. 680 has the force for which the Attorney-General contends. It is admitted that the section is required for the purpose of applying the Summary Jurisdiction Acts to the class of offences created by the Merchant Shipping Act. I think the words "shall be prosecuted summarily" are not sufficient to deprive the prisoner of the right to claim to be tried by a jury in this case. I think, therefore, that the

1904

REX v. GOLDBERG.

case has been properly dealt with in being sent to be tried at quarter sessions.

KENNEDY and PHILLIMORE JJ. concurred.

Appeal dismissed.

Solicitor for appellant: *Solicitor to Board of Trade.*
Solicitors for respondent: *C. V. Young & Son.*

A. P. P. K.

1904
Aug. 3, 4, 10.

[COMMERCIAL COURT.]

EMBERICOS *v.* ANGLO-AUSTRIAN BANK.

Bill of Exchange—Conflict of Laws—Cheque stolen Abroad—Forged Indorsement—Transfer in Foreign Country—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 24.

A cheque on a London bank was drawn abroad in favour of the plaintiffs, who indorsed it to their correspondents in London for collection. The cheque was stolen in transit and the indorsement of the plaintiffs' correspondents was forged, and it was then presented to and cashed by a bank in Vienna acting in good faith and without negligence. The Austrian bank indorsed the cheque to the defendants in London, who got it cashed. This action was then brought against them for conversion. According to Austrian law the Austrian bank had acquired under the circumstances a valid title to the cheque:—

Held, that the defendants were not liable in the action, since the transfer of the cheque to the bank at Vienna was governed by Austrian law and gave that bank a good title, which they had transferred to the defendants in London.

ACTION tried without a jury by Walton J. in the Commercial Court.

The action was brought by Messrs. L. & M. Embericos against the Anglo-Austrian Bank to recover damages for the wrongful conversion of a cheque.

On March 6, 1903, the Banque Générale Roumanie drew a cheque at Braila, in Roumania, on the Direktion der Disconto Gesellschaft of Cornhill, London, payable to L. & M. Embericos or order. The plaintiffs the same day at Braila specially

indorsed the cheque to G. Embericos & Co., and wrote to them in London inclosing the cheque. The cheque was, however, stolen from the envelope by a clerk of the plaintiffs.

On March 9, 1903, the cheque was presented at the bank of Messrs. Schelhammer & Schattera in Vienna by a person who desired that it might be cashed. It then bore the indorsement "G. Embericos & Co.," in addition to the special indorsement to that firm by the plaintiffs. The indorsements were apparently regular and in order, but the indorsement of G. Embericos & Co. was in fact a forgery. Messrs. Schelhammer & Schattera having telegraphed to the Banque Générale Roûmanie at Braila, and ascertained from them that the cheque was in order, cashed the cheque, and on the same day indorsed it to the defendants, and posted it to them in London, where they cashed it at the bank on which it was drawn.

According to an affidavit made as to the Austrian law by a Doctor of Law of the University of Vienna, "The holder of a cheque which he has bought bonâ fide without gross negligence and for value is identified as the proprietor of the cheque, and entitled to the proceeds thereof against all the world, notwithstanding that the cheque has been previously stolen, and notwithstanding that the indorsement has been forged." (1)

Bankes, K.C., and *Leslie de Gruyther*, for the plaintiffs. The case is governed by English law, and the defendants are liable. Under s. 24 of the Bills of Exchange Act, 1882, the forged indorsement was wholly inoperative. The defendants cannot have a better title because the cheque was stolen abroad: *Kleinwort* v. *Comptoir National d'Escompte de Paris* (2); *Lacave* v. *Crédit Lyonnais*. (3)

(1) By s. 24 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), "Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority."

(2) [1894] 2 Q. B. 157.

(3) [1897] 1 Q. B. 148.

1904

EMBERICOS v. ANGLO-AUSTRIAN BANK.

Cohen, K.C., and *Maurice Hill*, for the defendants. The important date is that of the conversion, which took place at Vienna, and according to Austrian law gave a good title to Messrs. Schelhammer & Schattera, which they transferred to the defendants. A title to a chattel legally acquired in a foreign country is recognised by English law: *Cammell* v. *Sewell* (1); *Castrique* v. *Imrie* (2); *Hooper* v. *Gumm.* (3) The question has already been decided by the Court of Appeal in *Alcock* v. *Smith.* (4)

[They also referred to s. 72 of the Bills of Exchange Act, 1882.]

Cur. adv. vult.

Aug. 10. WALTON J. In this case the plaintiffs, Messrs. Leonidas Embericos & Co., sued the defendants, the Anglo-Austrian Bank, for damages for the wrongful conversion of a cheque. The action raises an important question as to the rights of the parties under circumstances such as those of the present case. The plaintiffs were the payees of the cheque in question, which was stolen from them and fraudulently indorsed by the thief and presented by him or by an accomplice to a bank at Vienna, who took it for value and in all good faith, and indorsed it to the defendants. It is said that the defendants in dealing with the cheque are responsible in damages for the conversion of the cheque. The defendants, on the contrary, say that by the transfer of the cheque to the Vienna bank a good title to the cheque, which this Court is bound to recognise, passed to the Vienna bank, and that that bank gave an equally good title to the defendants, who when they presented the cheque for payment to the bank on which it was drawn were dealing with their own property, and not with the plaintiffs' property at all. This statement of facts is really sufficient for the case, but it may be as well to fill in a little the outline I have indicated. [The learned judge then stated the facts as above set out.]

There is no question between any of the parties to the

(1) (1860) 5 H. & N. 728.
(2) (1870) L. R. 4 H. L. 414.
(3) (1867) L. R. 2 Ch. 282.
(4) [1892] 1 Ch. 238.

cheque and the bank on which the cheque was drawn. The only question is between the plaintiffs, the original payees of the cheque, and a subsequent holder of the cheque who derived his title to the cheque through an indorsement which had been forged. It is plain that if the case is to be governed by English law the defendants have no defence to the action. Sect. 24 of the Bills of Exchange Act, 1882, is as follows: "Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature" But the defendants contend that the English law as laid down in that section does not apply to the present case, because the cheque was transferred in Vienna to the Vienna bank under circumstances which according to the law of Austria gave the Vienna bank a good title to the cheque, although it was handed to them by or on behalf of the thief and bore an indorsement which was a forgery. It is said that that is the effect of the Austrian law, and that the question of title must be determined according to the law of that country. There is no dispute, I think, as to the law of Austria on this point, and the affidavits of both the plaintiffs' and defendants' expert witnesses are to the same effect. It appears that according to Austrian law the bonâ fide holder of a cheque for which he has given value without gross negligence is entitled to the cheque, although it has been previously stolen and the indorsements upon it have been forged.

The question, therefore, that I have to decide is whether the validity of this transfer of the cheque is to be governed by Austrian or by English law. The learned counsel for the defendants relied on the general principle applicable to the transfer of chattels, which he contended applied to the transfer of this cheque. In *Alcock* v. *Smith* (1) Romer J. said: "Generally, the rights of transferor and transferee on a

(1) [1892] 1 Ch. 238, at p. 255.

1904

EMBERICOS v. ANGLO-AUSTRIAN BANK.

Walton J.

transfer, in one country, of a document of title to a debt or to an interest in personal property, are governed by the law of the country where the transfer takes place, although the debt may be due from persons living in, or the personal property may be situate in, a foreign country." The judgment was upheld in the Court of Appeal.

Mr. Cohen rightly contended, as it seems to me, that the law on the subject was correctly stated in rule 140 of Dicey's Conflict of Laws: "An assignment of a movable which can be touched (goods) giving a good title thereto according to the law of the country where the movable is situate at the time of the assignment (lex situs) is valid."

It cannot be disputed that that statement is correct in regard to ordinary chattels; and if this document were not a cheque but a valuable and portable article such as a diamond, which had been stolen from the plaintiffs and sold in Vienna under circumstances which gave the purchasers a good title there to the jewel, the English Courts would recognise that title if it was good according to the Austrian law, although it might not be good according to English law. The analogy of a sale in market overt seems to me exact. If goods which have been stolen are sold in market overt, the purchaser gets a good title to the goods, although according to the general law of England the thief could give no title to the stolen goods. It is the sale in market overt that gives the title. So if goods are sold in Vienna so as to give a good title to them, then that title will be held to be good in England, although the goods might have been previously stolen, and although the sale in England (not being in market overt) would not have given a title. The question is whether that principle applies not only to ordinary chattels but to a bill, note, or cheque, or other negotiable security.

In *Alcock* v. *Smith* (1) it seems to have been assumed throughout that the law was the same in regard to negotiable securities that it was in regard to ordinary chattels. In that case a bill of exchange had been purchased in Norway under circumstances which gave the purchaser a good title to the

(1) [1892] 1 Ch. 238.

bill in Norway according to Norwegian law, but which would not have given the purchaser a good title in England and according to English law. The bill was then indorsed by the purchaser to the defendants, and the plaintiffs in England claimed as against the defendants on the bill. Romer J. (as he then was) and the Court of Appeal applied the ordinary rule as to chattels to the bill of exchange, and held that because the purchase was good in Norway the defendants had a good title to the bill as against the plaintiffs. In my opinion *Alcock* v. *Smith* (1) governs the present case, and, as I am bound by it, my judgment must be for the defendants.

Another point taken was in regard to s. 72 of the Bills of Exchange Act, 1882: "Where a bill drawn in one country is negotiated, accepted, or payable in another the rights, duties, and liabilities of the parties thereto are determined as follows:—

"(1.) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance supra protest, is determined by the law of the place where such contract was made

"(2.) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill, is determined by the law of the place where such contract is made"

Mr. Cohen appeared hardly to rely on that sub-section, although if "the interpretation" of the indorsement means the legal effect of the transfer by indorsement it would cover this case. Indorsement, as interpreted by the Bills of Exchange Act, 1882, means (by s. 2) "an indorsement completed by delivery." That is to say, it means in this case the delivery of the cheque indorsed. It is said, however, that the word "interpretation" in sub-s. of s. 72 must be read in its strict sense. But, whether that sub-section does or does not apply to the present case, it seems to me that it in no way prevents the general rule from applying.

I do not think that I can say that the general rule only

(1) [1892] 1 Ch. 238.

1904

EMBERICOS v. ANGLO-AUSTRIAN BANK.

Walton J.

applies in so far as it is expressly mentioned, because this Act does not purport to be a scientific code dealing with the whole law relating to bills of exchange, but it is more in the nature of a digest of the law on the subject, and it contains, like many similar statutes, a general saving clause (s. 97, sub-s. 2) providing that "the rules of common law, including the law merchant, save as in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques." Therefore, even if s. 72, sub-s. 2, does not govern the present case, I think the general principle does apply, and that the effect is the same as if a chattel other than a negotiable instrument had been transferred at Vienna.

Another question is raised. By Austrian law the title of the bank at Vienna, and therefore the title of the defendants, is only good if there was no "gross negligence" on the part of the bank, and it is said that the conduct of the bank in taking the cheque from a stranger amounted to gross negligence. I am satisfied, however, on the facts that the bank were not guilty of gross negligence, or indeed of any negligence at all, and that they could not have done more than they did in making inquiries as to the bona fides of the cheque. I think, therefore, that this case is really governed by the decision in *Alcock* v. *Smith* (1), and that there must be judgment for the defendants. No doubt in that case there was no question of fraud—the cheque there was not stolen; but that does not seem to me to make any difference.

Judgment for the defendants.

Solicitors for plaintiffs: *Downing, Handcock, Middleton & Lewis.*

Solicitors for defendants: *Bircham & Co.*

(1) [1892] 1 Ch. 238.

A. P. P. K.

HORNER *v.* FRANKLIN.

1904
Aug. 10.

County Court — Jurisdiction — Landlord and Tenant — Factory — Expense of complying with Requirement of Sanitary Authority — Lessee's Covenant — "Outgoings" — Lessor's Right of Action — Factory and Workshop Act, 1891 (54 & 55 *Vict. c.* 75), *s.* 7, *sub-s.* 2.

Where a lessee of a factory has covenanted to pay all outgoings for the time being payable by the lessor in respect of the demised premises, and the lessor incurs expenses in complying with the requirements of the sanitary authority under s. 7, sub-s. 2, of the Factory and Workshop Act, 1891, the expenses are "outgoings" within the covenant; but the lessor cannot recover them from the lessee by suing him on his covenant in the High Court. An application to a county court for an order against the lessee under s. 7, sub-s. 2, of the Act is the only procedure open to the lessor.

The extent of the jurisdiction of the county court, when making an order under this section, as laid down in *Monk* v. *Arnold*, [1902] 1 K. B. 761, discussed.

ACTION tried by Darling J. without a jury.

By a lease dated May 3, 1890, the plaintiff demised to the defendants two warehouses, situate at the rear of No. 27, Lamb Street, Spitalfields, for a term of twenty-one years from March 25, 1890, at the annual rent of 60*l*. The lease contained a covenant by the defendants that they would during the term of the lease "pay all the existing and future taxes, sewers rates, and rates, assessments, and outgoings of every description for the time being payable by the landlord or tenant in respect of the said demised premises (the landlord's property tax alone excepted)."

The lease also contained a covenant by the plaintiff that within one month of the execution of the lease he would brick up, in a proper and workmanlike manner, two doorways leading from the demised premises into 27, Lamb Street, and into a stable-yard respectively. This covenant had been duly performed by the plaintiff.

The premises demised were used by the defendants for the purposes of their business in connection with other adjoining premises in their occupation, and were a factory within the meaning of the Factory and Workshop Acts. On February 7,

1904

HORNER v. FRANKLIN.

1901, the plaintiff was served by the London County Council with a notice under seal under the Factory and Workshop Acts, 1878 to 1895, requiring him as owner of the demised premises to carry out certain work at the premises, so as to provide means of escape in case of fire. The work in question consisted in part of opening up the two doorways which had been bricked up by the plaintiff in accordance with his covenant, and of providing an external staircase. The plaintiff complied with the notice, and spent 185*l.* 12*s.* in executing the requisite works. In this action he sued the defendants to recover that sum as being payable by them under the terms of their covenant.

R. C. Glen, for the defendants. The expenditure incurred by the plaintiff in carrying out the works required by the notice is not an "outgoing" within the meaning of the defendants' covenant. The authorities shew that a payment to come within a covenant of this sort must be one which was within the contemplation of the parties at the time the lease was made: *Foulger* v. *Arding* (1); *Arding* v. *Economic Printing and Publishing Co.* (2); and as the Factory Act, 1891, had not been passed at the date of this lease, it is clear that this particular payment could not have been in the contemplation of the parties. But even if the payment is an outgoing, it is not an outgoing payable by the landlord "in respect of the demised premises." It may have been payable in respect of the premises, but not in respect of the premises as demised, because the work consisted of alterations in and additions to the demised premises. Lastly, this action must in any case fail, because the only means by which the plaintiff can recover this expenditure from the defendants is by an application to a county court judge under s. 7, sub-s. 2, of the Factory Act, 1891. (3) Under that Act the duty of providing means of

(1) [1902] 1 K. B. 700.

(2) (1898) 79 L. T. 420, 622.

(3) By the Factory and Workshop Act, 1891 (54 & 55 Vict. c. 75), s. 7, sub-s. 2, "With respect to all factories in which more than forty persons are employed, it shall be the duty of the sanitary authority . . . to ascertain whether all such factories within their district are provided with such means of escape as aforesaid, and in the case of any factory which is

escape from fire is placed upon the owner of the premises, and he is liable to penalties if he fail to do so. If the owner contends that the occupier is liable to repay him the cost, then the Act says that the owner may apply to a county court judge for an order, and it was held in *Monk* v. *Arnold* (1), which is decisive of this case in the defendants' favour, that on such an application the county court judge has jurisdiction, whatever may be the legal effect of any covenant between the parties, to make such order apportioning the expense between the parties as may seem just and equitable under all the circumstances of the case. Although sub-s. 2 of s. 7 says that the owner "may" apply to a county court judge, that does not mean that the owner has as an alternative the right to sue on the covenant in the High Court. If he had that right the very object of the section would be defeated, because the owner would always adopt the latter course in preference to applying to a county court judge, in a case where it was just and equitable that the occupier should not bear the whole expense. It is clear that this must be the true construction of s. 7, sub-s. 2, if the section is contrasted with s. 101, sub-s. 8, of the Factory Act of 1901, which expressly provides that in cases under that section regard shall be had to the terms of any contract between the parties; and consequently it was held in *Goldstein* v. *Hollingsworth* (2) and *Morris* v. *Beal* (3) that, where the occupier was bound by covenant to pay all

not so provided, to serve on the person being within the meaning of the Public Health Act, 1875, the owner of the factory, a notice in writing specifying the measures necessary for providing such means of escape as aforesaid, and requiring him to carry out the same before a specified date; and thereupon such owner shall, notwithstanding any agreement with the occupier, have power to take such steps as are necessary for complying with the requirements If the owner alleges that the occupier of the factory ought to bear or contribute to the expenses of complying with the requirement, he may apply to the county court having jurisdiction where the factory is situate, and thereupon the county court, after hearing the occupier, may make such order as appears to the Court just and equitable under all the circumstances of the case."

[NOTE.—The above section was repealed by the Factory and Workshop Act, 1901; but s. 14 of the latter Act contains a similar provision.]

(1) [1902] 1 K. B. 761.

(2) [1904] 2 K. B. 578.

(3) [1904] 2 K. B. 585.

1904

HORNER v. FRANKLIN.

outgoings, there was no jurisdiction under s. 101, sub-s. 8, to make an order apportioning the expenses between the owner and the occupier.

A. H. Poyser, for the plaintiff. The word "outgoings" in this covenant covers the payment made by the plaintiff, and the contention that in construing covenants of this kind regard must be had to what may be supposed to have been in the contemplation of the parties was expressly rejected by the Court of Appeal in *Stockdale* v. *Ascherberg*. (1) It follows, therefore, that the plaintiff is entitled to recover in this action unless the argument of the defendants as to the meaning and effect of s. 7, sub-s. 2, of the Act is well founded. It is submitted that there is nothing in the language of the sub-section rendering it obligatory on the landlord to take proceedings in the county court. The section uses the word "may," not "must," shewing that it was intended to be in aid of the landlord, by enabling him, in a case where the matter was not dealt with by any contract between the parties, to apply to the county court judge for an order that the tenant should bear his fair share of the expense. This question was not before the Court in *Monk* v. *Arnold* (2), for there the landlord had in fact taken proceedings in the county court; but in *Shephard* v. *Barber* (3) Lawrance J. held that a landlord might sue the tenant on his covenant in the High Court, and that his remedy was not confined to making an application in the county court for an order under s. 7, sub-s. 2.

DARLING J. This case raises a question of considerable difficulty. The matter arises in this way. In 1890 the defendants took a lease from the plaintiff of certain premises, which in consequence of what was done to them became a factory within the meaning of the Factory and Workshop Act, 1891. The lease contained a covenant by the defendants that they would "during the said term pay all the existing and future taxes, sewers rates, and rates, assessments, and outgoings of every description for the time being payable by landlord or

(1) [1904] 1 K. B. 447. (2) [1902] 1 K. B. 761.
(3) (1902) 67 J. P. 238.

tenant in respect of the said demised premises (the landlord's property tax alone excepted)." There was also in the lease a covenant by the lessor that he would, "within one month after the execution of these presents, brick up, in a proper and workmanlike manner, the two doorways leading from the premises hereby demised into the premises 27, Lamb Street, and into the stable-yard respectively." In pursuance of this covenant the two doorways were bricked up by the plaintiff. Subsequently the London County Council, acting under s. 7, sub-s. 2, of the Factory and Workshop Act, 1891, called upon the plaintiff to make certain alterations on the premises in order that the place might not be dangerous in case of fire, and amongst other things the plaintiff was required to open up the doorways which had been bricked up by the plaintiff under his covenant. The plaintiff complied with the requirements of the council, and in so doing expended the sum of 185*l.* 12*s.* He seeks in this action to recover that sum from the defendants, the lessees, and he claims to be entitled to do so by reason of the covenant by the lessees under which they have agreed to pay all outgoings. The plaintiff further claims to be entitled to recover the money in this Court without having recourse to the county court under the provisions contained in s. 7, sub-s. 2, of the Act.

On behalf of the plaintiff it is contended that the expenditure incurred by the plaintiff is an "outgoing" within the meaning of the defendants' covenant, and is, therefore, recoverable. For the defendants it is argued that that is not so, because the outgoings mentioned in the covenant are outgoings "in respect of the demised premises," and it is said that the premises in respect of which the expenditure was incurred were not the demised premises, because in the demised premises these doorways were open, and they were only closed up in fulfilment of the lessor's covenant in the lease, and the money was spent by the plaintiff in reopening that which had been open at the time of the demise. That is an ingenious argument, but I do not think that the word "premises" in the covenant can be construed quite so narrowly as that. The word "premises" in the lease is, I think, a vague, loose term, meaning the subject-

1904

HORNER v. FRANKLIN.

Darling J.

matter of the demise, even though under the terms of the lease it might be subsequently altered. It must have been contemplated that after the alterations the rent would still have to be paid in respect of the premises, not in respect of something which had ceased to exist. I think, therefore, that Mr. Glen's argument on this point fails, and I hold that these expenses were outgoings in respect of the demised premises within the meaning of the lessees' covenant.

It was further contended for the defendants that, assuming the expenses were outgoings, the plaintiff could not bring this action in the High Court, but ought to have gone to the county court. This argument is based on s. 7, sub-s. 2, of the Factory and Workshop Act, 1891, which provides that, "If the owner alleges that the occupier of the factory ought to bear or contribute to the expenses of complying with the requirement, he may apply to the county court having jurisdiction where the factory is situate, and thereupon the county court, after hearing the occupier, may make such order as appears to the Court just and equitable under all the circumstances of the case." It is to be observed that the words of the section are, "ought to bear"; it does not say, "ought to bear if there were no contract between the parties." The section also says that the owner "may" apply to the county court, and if he does the county court judge can make an order which a judge sitting in this Court cannot make, because the section only applies to an application to the county court, and not to the High Court. For the plaintiff it is said that the section is permissive only, that the owner is not limited to the county court, and that he may if he likes sue in the High Court on the covenant and recover the whole amount of the expenditure, although, if he had gone to the county court, the county court judge might have held that it was not just or equitable in all the circumstances of the case that the defendants should have to pay the whole amount. This point, whether the owner is bound to go to the county court, has never been decided. It seems to have been left open, and I think designedly, in the judgment of the Lord Chief Justice in *Monk* v. *Arnold*. (1) In that case he

(1) [1902] 1 K. B. 761.

said: "Mr. Russell contends that this interpretation of the section cannot be right, because the landlord may sue in the High Court on the covenant of the tenant to pay all outgoings, and as the jurisdiction given by this section can only be exercised in the county court, and can only be invoked by the owner, such a construction would work injustice to the tenant. That is no doubt a difficult point. It may be that it is a casus omissus; but I think it is impossible not to give their natural meaning to the plain words of the section." I agree with what the Lord Chief Justice there said, that the construction of the section now contended for might work injustice to the occupier. I go further. I think it is manifest that it would do so, because the circumstances of a case might be such that a county court judge, or any judge, would think it just and equitable that the owner should bear all the expenses, or that they should be borne between the owner and occupier in a certain proportion, and if on the true construction of the section the owner is not bound to go to the county court, he might in that case, knowing that a county court judge would order him to bear either the whole or a part of the expenditure, refrain from applying to the county court, and bring an action on the covenant in the High Court for the very purpose of recovering that which he knew no judge could hold to be just and equitable. I do not think that a construction of the section leading to such a result can be right. I think the section means that the owner must apply to the county court—that the Legislature has directed that it is the county court which is to deal with these cases, and in doing so to decide whether it is just and equitable that the occupier shall bear the whole or any part of this expenditure. I also think that if an application had been made to the county court in this case, the judge might have taken into consideration the contract between the parties contained in their covenant. I do not think that it is only in cases under s. 10, sub-s. 8, of the Factory Act, 1901, which deals with bakehouses and which contains the words "regard being had to the terms of any contract between the parties," that the terms of a contract may be taken into consideration. I think that a county

1904

HORNER v. FRANKLIN.

Darling J.

court judge, to whom this wide equitable jurisdiction is given by s. 7, sub-s. 2, of the Act of 1891, may also consider the terms of any contract entered into between the parties. I think that we decided this in *Monk* v. *Arnold*. (1) At least, I for my own part intended to; but I do not rely on my own judgment alone, for I find that Channell J. in his judgment in that case said: "The Legislature seeing that it would be difficult to say whether such an obligation as this ought to be imposed on the landlord or the tenant of the factory, and seeing that that question would commonly depend on the circumstances of each particular tenancy, deliberately refrained in this section from imposing the liability finally upon the landlord. They put the liability on the landlord in the first instance because it was easiest and best in the public interest to make him primarily responsible; but they gave the county court judge power to say how the liability should ultimately fall, and for that purpose they gave him, as I think, power over the contract which had been entered into between the landlord and the tenant." I entirely agree with what my brother Channell there said. I think that power was given to the county court judge to deal, not only with the circumstances of the case, but also with the contract between the parties. Channell J. went on to say: "If the parties had by express terms provided for expenses under this section of the Factory Act, so that by that contract the liability for those expenses fell clearly on either the landlord or the tenant, then I do not think it would be just or equitable for the county court judge to make any other order." Thus, if in the present case it were plain from the terms of the lease that the tenant had covenanted to pay for all alterations necessary to make the premises more safe, then, although the county court judge might think that but for that covenant it would be just and equitable that the expense should fall on one party or the other, or should be borne between them, yet he might say that, as the expenditure had been contemplated and provided for in the lease, he would not make the order, which, but for that, he would have done. In the present case, however, the word used, namely, outgoings, is very wide and vague, and this

(1) [1902] 1 K. B. 761.

particular outgoing could not have been in the contemplation of the parties, because the Factory Act, 1891, had not been passed at the date when the covenant was entered into. In the same judgment Channell J. went on to say: "If that liability would only fall on either of them by reason of some general expression in the covenant, sufficient possibly to include such expenses as these if the statute had absolutely imposed them on the landlord, but not clearly shewing that the parties had really contemplated the case, and intended that one or other of them should bear these expenses whether incurred at the beginning or end of the term, then I think that would be precisely the case in which the county court judge ought to make such order as might seem to him just and equitable in all the circumstances of the case."

All these considerations, however, although entirely applicable to the case, are quite outside my purview sitting here, and being asked simply to give judgment for the plaintiff for the amount claimed. If the plaintiff had applied to the county court, all these matters would have been taken into consideration. The county court judge might have thought that, having regard to all the terms of the lease, the plaintiff was entitled to be repaid all the amount expended; on the other hand, he might have come to the conclusion that it was just and equitable that the defendants should bear none or only a part of it. These are questions which will have to be decided by the county court judge if an application be made to him. All that I decide is that the plaintiff is not entitled to recover in *this* action. The Act has placed the expense of making the alterations on the owner, and the only remedy which he has over against the occupier is that given by the Act, namely, by applying to the county court.

For these reasons I am of opinion that the action fails, and there must be judgment for the defendants with costs.

Judgment for defendants.

Solicitor for plaintiff: *E. Betteley.*
Solicitors for defendants: *Syrett & Sons.*

F. O. R.

1904
May 13.

LONDON COUNTY COUNCIL *v.* ILLUMINATED ADVERTISEMENTS COMPANY.

London—Buildings—"Building or Structure"—Erection of, beyond General Line of Buildings—Advertisement Sign attached to Front Wall of Building—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 22, *sub-s.* 1; *s.* 200, *sub-s.* 3.

By s. 22, sub-s. 1, of the London Building Act, 1894, "No building or structure shall without the consent in writing of the council be erected beyond the general line of buildings in any street"

The respondents, without the consent of the appellants, erected upon the front walls of their house twelve cases used as electrical advertisement signs; they were constructed of sheet-iron and supported by iron supports pinned through the wall, and stood out ten inches in front of the wall and of the general line of buildings; the whole of the cases, except the iron supports, could be removed in a day without injury to the building:—

Held, by Lord Alverstone C.J. and Kennedy J. (Wills J. dissenting), that the cases were not structures within the meaning of the section.

Hull v. *London County Council*, [1901] 1 K. B. 580, discussed and disapproved.

CASE stated by a metropolitan police magistrate.

The respondents had appeared to answer an information which charged that they did unlawfully erect certain structures in contravention of the provisions of Part III. of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), to wit, did unlawfully erect certain structures beyond the general line of buildings of a street called Cranbourn Street without the consent in writing of the London County Council, whereby they became liable to the penalty prescribed by s. 200, sub-s. 3, of the said Act as amended by the London Building Act, 1894, Amendment Act, 1898, and to have an order made against them to demolish the said structures or any part thereof. Upon the hearing the following facts were proved or admitted.

In April and May, 1903, the respondents erected upon the front walls of No. 48, Cranbourn Street twelve advertisement cases constructed of sheet-iron supported by strong wrought-iron supports securely cut and pinned through the front walls

of the building; the outer side of each case was covered with a wooden frame carrying canvas or linen lined with advertisements, and provision was made for illuminating the interiors of the cases by electric light. The cases varied in width from two to five feet, and in height from five to seven feet. Each case stood out ten inches in front of a front wall of the building, but each projection was less than the projection of the existing cornice over the shop, which was two feet from the face of the main building. The front of each case was about ten inches beyond the general line of buildings as determined by a certificate of the superintending architect of metropolitan buildings. It would be possible to move the whole of the cases, with the exception of the iron supports, in a single day without injury to the building. The respondents had not obtained the consent of the appellants to the erection of the cases.

The appellants contended that the cases so fixed and supported were structures within the meaning of s. 22 and s. 200, sub-s. 3, of the London Building Act, 1894; the respondents contended that they were not structures within the meaning of s. 22 of that Act. (1)

The learned magistrate was of opinion that the cases were not structures within the meaning of the Act; that they were in their nature mere excrescences which could be removed at will without injury to the fabric; and that they could not be said to be a "bringing forward" of the main building such as was contemplated by the statute. He accordingly dismissed the summons.

The question of law for the opinion of the Court was whether, upon the true construction of the sections referred to in the case, the respondents on the facts stated had erected a structure or structures beyond the general line of buildings.

(1) By the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 22, sub-s. 1, "No building or structure shall without the consent in writing of the council be erected beyond the general line of buildings in any street. . . ." By s. 200, sub-s. 3, a penalty is imposed on every person who erects or brings forward any building or structure in contravention of any of the provisions of Part III. of the Act, in which s. 22 is included.

1904

LONDON COUNTY COUNCIL v. ILLUMINATED ADVERTISEMENTS COMPANY.

Avory, K.C. (*Daldy* with him), for the appellants. These advertisement cases are structures within the meaning of s. 22; they are similar to a bay window, which would clearly be within the section. The operation of s. 22 is not confined to the bringing forward of the main building beyond the general building line; it has been held to apply also to a portico or shelter built up against the front main wall: *Coburg Hotel* v. *London County Council.* (1) The appellants were precluded from treating these cases as projections within the meaning of s. 73, sub-s. 8, of the Act by reason of the decision in *Hull* v. *London County Council* (2), where it was held that that section applied only to projections which formed a part of the building from which they projected; the facts in that case are substantially the same as in the present, the only difference being in the mode and extent of the annexation to the buildings. The meaning of "structure" was discussed in *Venner* v. *McDonnell* (3), a case relating to the interior fittings of a building, and, therefore, not an authority upon the section now under discussion, and the Court held that no general rule could be laid down, but that the word must in each case be construed in accordance with the context. Looking to the facts of the present case, and having regard to the danger of fire being caused by such erections, it is necessary to give an extended meaning to the word "structure" as used in s. 22. It is submitted that the decision in *Hull* v. *London County Council* (2) should be reviewed; the Court was influenced in its decision by the fact that under s. 164 the county council has the power to make by-laws for regulating lamps, signs, and other structures overhanging the public way; but the answer to that suggestion is that the section only authorizes a by-law for the "regulation" of signs, and gives no power to prohibit them altogether.

Macmorran, K.C. (*H. Cassie Holden* with him), for the respondents. These cases are not structures within the meaning of s. 22; that section deals only with buildings or

(1) (1899) 81 L. T. 450. (2) [1901] 1 K. B. 580.
(3) [1897] 1 Q. B. 421.

structures—that is, structures in the nature of buildings; the word "erection," which was coupled with building and structure in s. 75 of the Metropolis Management Act, 1862, and on which some reliance might have been placed, is omitted in s. 22 of the Act of 1894. The case of *Coburg Hotel* v. *London County Council* (1) is distinguishable on the ground that there the structure was a very large one, and was so substantially affixed to the main building as to become a part of it, and the effect of what was done was to bring forward or extend the building itself. The object of s. 22 is to deal with the general line of buildings—that is, with the front wall of the main building, and not with projections over the footway, which can be dealt with by by-laws, and which (if they become dangerous) fall within s. 102, and can be dealt with as dangerous structures. In a sense everything of this kind may be called a structure, and the question of degree must always be present, as was pointed out in *Hull* v. *London County Council* (2) and in *Venner* v. *McDonnell*. (3) The question of whether a particular erection is a structure is really a question of fact in each case—a view which has received the sanction of Lord Esher M.R. in *Wendon* v. *London County Council* (4), and of the Divisional Court in *Lavy* v. *London County Council* (5); and the finding of the magistrate on the question of fact cannot be questioned.

Avory, K.C., in reply.

KENNEDY J. I am unable to come to the conclusion that the decision of the learned magistrate should be overruled. I cannot say much more than that, in my judgment, the question is one of fact and of degree in each particular case. The learned magistrate has no doubt put it to us as a question of law; but if I am right in my view that it is a question of fact and degree in each case, it was for him to decide it; and he has decided it by his finding that these cases were not structures within the meaning of the Act. I do not think that anything

(1) 81 L. T. 450.
(2) [1901] 1 K. B. 580.
(3) [1897] 1 Q. B. 421.
(4) [1894] 1 Q. B. 812.
(5) [1895] 1 Q. B. 915.

1904

LONDON COUNTY COUNCIL v. ILLUMINATED ADVERTISEMENTS COMPANY.

Kennedy J.

is gained by calling the cases "mere excrescences"; I do not know what a mere excrescence is intended to mean; but I cannot say that he was wrong in law in holding that this particular thing was not a building or structure erected within the meaning of the section. The cases were, I should certainly say, not necessarily intended to be permanent; the probable intention was that the tenant should remove them in the event of his going to other premises. An advertisement case like those in question is not like a bay window, or something of that kind which from its nature, and of whatever material it is composed, is intended to form part of the main building. I agree at the same time that there may be a structure, such as a greenhouse, which under certain conditions might be a structure or building within the meaning of the statute, although it might in fact be structurally removable without injury to the main building; for it would primâ facie be intended to be permanent, and would be within the statute if it stood out beyond the general line of buildings. In the view I take, I cannot hold as a matter of law that these cases were buildings or structures; but had the question arisen under s. 73, sub-s. 8, as to whether they were projections, I should have been inclined to say that they were, unless we are hampered and prevented from so holding by the previous decision of this Court in *Hull* v. *London County Council* (1), a decision which, I think, will deserve further consideration.

WILLS J. I have the misfortune to differ from the view taken by my Lord and by my brother Kennedy. Questions of this kind are always questions of mixed law and fact, and it is not easy to say in each case to what extent considerations of law or of fact should prevail; it seems clear to me, however, that the learned magistrate did not intend us to deal with this case as if he had found as a fact that this advertisement case was not a structure. I desire to take my stand on th description of the erection in the special case, where it is described as being constructed of sheet-iron supported by strong wrought-iron supports securely cut and pinned through the

(1) [1901] 1 K. B. 580.

front walls of the building: that is sufficient to shew the nature of the advertisement cases. It seems to me that it would be difficult to have any amount of annexation, short of such complete annexation as would prevent removal by the tenant, which could go much further than that which is found to exist in the present case. In my opinion while such a case is thus annexed to the building, it is part of the building, although no doubt it is capable of removal without injury to the building; if it is not part of the building, it is nevertheless in my opinion a structure. If glass had been used instead of canvas, it would have been a window, and then there would have been no difficulty in holding it to be a structure. I do not think that any advantage is to be gained by a consideration of other portions of this statute. As to *Hull* v. *London County Council* (1), if it be rightly decided, it might be relied upon in support of my view, for it is extremely unlikely that erections of this kind should be left wholly untouched by this legislation; and so long as the character of the annexation is the same, it seems to me to be immaterial whether the projection is one of inches or feet. But as I agree that it is not a satisfactory case, although we are bound by it, I do not base my judgment in any degree upon this consideration. For the reasons I have given I think that the erection in question was a building or structure, and that this appeal should be allowed.

LORD ALVERSTONE C.J. I agree with the greater part of the judgment of my brother Wills, but not with the conclusion at which he has arrived. I entirely assent to his view that what we have to do is to construe the words used in each of the sections with regard to the purview of that particular section; but it does seem to be legitimate to consider whether a particular thing is dealt with in one part of the Act or in another, and to that extent only is it material to consider other sections in this statute. The main ground on which I desire to base my judgment is that I am unable to say that the learned magistrate has come to an erroneous conclusion on a matter of law; I do not indeed think that he meant so to state

(1) [1901] 1 K. B. 580.

1904

LONDON COUNTY COUNCIL v. ILLUMINATED ADVERTISEMENTS COMPANY.

Lord Alverstone C.J.

the case as to say that his finding was one of fact, but his conclusion was certainly in one sense a conclusion of fact, and I cannot say that in coming to it he has gone wrong in law. On his finding I must assume that these cases could be removed by the tenant whenever he pleased; they were therefore not fixtures in the sense in which we should apply that term to a bay window, for they could be removed without any injury to the main building. The question we have to ask ourselves is whether on the facts found the learned magistrate was bound to hold as a matter of law that such a structure came within either s. 22, sub-s. 1, or s. 200, sub-s. 3, of the Act. I have been much struck by the description of these things (to use an indefinite term) in the special case and of their mode of annexation to the main building; we cannot, however, deal with this class of case simply on the ground of the way in which the particular thing is constructed, for it is easy to imagine things far less substantially constructed which would be much more clearly infringements of s. 22, sub-s. 1, than those in the present case. Sect. 22, sub-s. 1, is in a group of sections in Part III. of the Act dealing with lines of building frontage, and it deals not only with buildings, but also with structures in the nature of buildings. But when we look at s. 23, which deals with setting back buildings after they have been taken down, and at s. 26, which relates to conditions which the council may attach to their consent to the erection of a building beyond the general line of buildings, it seems to me that they involve considerations different from those which ought to be borne in view when dealing with a case like the present. I may add that other sections of this Act deal with projections from buildings, and I think that these cases were undoubtedly projections, although, of course, I am hampered in coming to such a conclusion, or in giving effect to it, by the decision in *Hull* v. *London County Council*. (1) Upon that point I only desire to say that if, upon a proper statement of facts, the question should come before us whether such a thing is a projection within the meaning of s. 73, sub-s. 8, the question of how far that decision is to be in future treated as an

(1) [1901] 1 K. B. 580.

authority should, if possible, be considered by the Court of Appeal. I cannot see, however, that upon that ground any argument can be based for enlarging the operation of s. 22; that section, with the other sections in Part III., deals with a different subject-matter and not with projections, which are dealt with under other sections of the Act. I agree, therefore, with my brother Kennedy that the learned magistrate did not come to a wrong conclusion on a matter of law, and that this appeal should be dismissed.

1904

LONDON COUNTY COUNCIL v. ILLUMINATED ADVERTISEMENTS COMPANY.

Lord Alverstone C.J.

Appeal dismissed.

Solicitor for appellants: *W. A. Blaxland.*
Solicitor for respondents: *Maurice Mosley.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1904
Aug. 6.

LEADBETTER AND OTHERS *v.* MARYLEBONE CORPORATION.

London—Buildings—Party Wall—Building Notice—Difference between Building Owner and Adjoining Owner—Arbitration—Jurisdiction of Arbitrators—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 88, 89, 90, 91, 95.

The plaintiffs and defendants were the freeholders of adjoining houses in London. In 1902 the tenant of the plaintiffs' house, being about to rebuild it in pursuance of a building agreement in a manner which involved the rebuilding of the party wall between the houses, gave notice to the defendants of his intention to do the work under s. 90 of the London Building Act, 1894; and the defendants, as adjoining owners, served upon him a notice under s. 89 setting out the requisitions with which they required him to comply. A difference having arisen between the parties in respect of the execution of the works within the meaning of the Act, it was referred under s. 91 to the arbitration of certain surveyors, who by their award, after deciding as to the dimensions and mode of erection of the party wall, further awarded (inter alia) that the adjoining owners (the defendants) should have the right at any time to raise the wall as they might desire. The building operations were then carried out by the plaintiffs' tenant. In 1904 the defendants proceeded to raise the height of the party wall and to build upon it without giving a building owner's notice to the plaintiffs (who had in the meantime acquired the

C. A. 1904

LEADBETTER v. MARYLEBONE CORPORATION.

interest of their tenant), contending that they were entitled to do so under the terms of the award:—

Held, that the defendants, when they became desirous of building upon the party wall, became "building owners" within the meaning of the Act, and were under an obligation to serve a building owner's notice under s. 90 upon the plaintiffs before commencing the work; (2.) that the jurisdiction of the arbitrators was limited by s. 91 to differences arising with reference to the work to which the original notice given to the defendants under s. 90 related, that the arbitrators had acted beyond their jurisdiction in awarding that the defendants might in the future raise the wall as they desired, and that their award was pro tanto invalid.

APPEAL against an order for an interlocutory injunction made by Phillimore J. at chambers, by which the defendants were restrained from building upon the party wall between Nos. 33 and 34, John Street, Edgware Road, without giving to the plaintiffs a building owner's notice under the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.).

It appeared that the plaintiffs were the freeholders of No. 33, John Street, and the defendants were the freeholders of No. 34, the adjoining house. In the early part of 1902 a building agreement was entered into between the plaintiffs and one Ecclestone, under which Ecclestone was to pull down No. 33, and to erect a new building upon the site; at a certain stage of the building operations a lease of the premises was to be granted to Ecclestone by the plaintiffs. It became necessary to deal with the party wall between Nos. 33 and 34, which Ecclestone proposed to pull down and to rebuild of greater strength, and he accordingly served a building owner's notice under s. 90 of the Act upon the defendants specifying the work which he proposed to do upon the wall. The defendants were at that time intending to pull down No. 34 and to build workmen's dwellings upon the site, for which purpose it was necessary to have an exceptionally strong party wall, and the wall shewn on Ecclestone's plan was of less strength than they required for their purpose; they therefore served upon Ecclestone a notice under s. 89 of the Act setting out the requisitions which they required to be complied with when the party wall was rebuilt. The difference between the parties was referred to two surveyors, who made an award by which the party wall was to be much thicker than

would ordinarily be necessary, the extra thickness to be on the premises (No. 34) belonging to the defendants; they further awarded that the defendants were to have the right at any time to raise the party wall as they might desire. The party wall was then built in accordance with the award by Ecclestone, who completed his building, a lease of which was granted to him by the plaintiffs; this lease was subsequently surrendered by Ecclestone to the plaintiffs, who were in possession of the premises. In 1904 the defendants, for the purpose of completing their block of workmen's dwellings, proposed to raise the height of the party wall; but the plaintiffs objected on the ground that the defendants, being building owners, were under an obligation to serve them with a building owner's notice under the Act before proceeding to increase the height of the party wall, and that so much of the award as purported to reserve to the defendants liberty to raise the height of the wall at any time as they might desire was ultra vires.

The defendants having commenced operations for raising the party wall, the plaintiffs brought this action, claiming an injunction to restrain the defendants from building on the party wall without first serving a building owner's notice under the Act, and Phillimore J. at chambers granted an interlocutory injunction; the defendants appealed. It was agreed in the course of the argument that the appeal should be treated as the hearing of the action.

English Harrison, K.C. (*G. A. Scott* with him), for the defendants. The award was good, and the defendants were entitled under it to raise the height of the party wall without serving a building owner's notice under s. 90 upon the plaintiffs. The rights of a building owner in regard to party structures are defined with great particularity in s. 88 of the Act, and s. 89 deals with the rights of the adjoining owner, who is empowered to serve on the building owner a notice requiring him to execute certain specified works upon the party structure, and any difference between the parties as to the nature and extent of the necessary work is to be referred to arbitration. Then under s. 90 the building owner must (in the absence of consent) serve

C. A. 1904

LEADBETTER v. MARYLEBONE CORPORATION.

a notice on the adjoining owner stating the nature and particulars of the proposed work and the time at which it is proposed to be commenced, and s. 91 provides for the settlement of differences between the parties by the award of surveyors. The mere fact that the defendants were desirous of making use of the party wall originally built by the plaintiff and of themselves building upon it did not make them building owners within the meaning of the Act; they continued to be adjoining owners under the award, and were entitled to carry out their contemplated works. The power given to the surveyors by s. 91 is a power not merely to settle any matter in dispute to which the notice relates and to determine the right to do, and the time and manner of doing, any work to the party wall, but also power to determine "generally any other matter arising out of or incidental to such difference"; the future use to be made of the party wall by the defendants is a matter arising out of or incidental to the difference between themselves and the plaintiffs as to the mode in which the party wall was to be built, for the mode and conditions of building it were determined with reference to the future use that might be made of it by the defendants as adjoining owners.

Bankes, K.C. (*A. H. Poyser* with him), for the plaintiffs. The order of Phillimore J. was right, and was based on the only possible construction of the statute. The award, so far as it purported to give the defendants power to build in the future on the party wall, was bad, for when the defendants became desirous of raising the height of the wall they lost their original character of adjoining owners and became building owners within the meaning of the statute, and were subject to the statutory liability of building owners to give the requisite notice to the adjoining owners before commencing the work. By s. 5, sub-s. 31, of the Act "building owner" is defined as including (inter alia) "such one of the owners of buildings, storeys, or rooms, separated from one another by a party wall or party structure, as does, or is desirous of doing, a work affecting that party wall or party structure"; and by s. 5, sub-s. 32, "adjoining owner" means "the owner or one of the owners of buildings, storeys, or rooms adjoining those of the building owner": these

two definitions exactly express the respective positions of the defendants and the plaintiffs at the time when the defendants became desirous of building on (and thereby affecting) the party wall. The rights of an adjoining owner are comprehensively defined in s. 89, while s. 91, on which the defendants rely, merely indicates the mode of procedure in case of a difference being referred to arbitration, but gives no further rights to the parties than those which have already been given in the preceding sections. The provisions of this part of the Act were recently the subject of careful consideration in this Court in *In re Stone and Hastie* (1), and it is clear from that decision that the submission to arbitration is a statutory submission, and that an award is only binding to the extent to which it is within the powers expressly given by the statute. The arbitrators have no power to deal with anything more than the work which the building owner is to do then and there to the party wall, and it was wholly ultra vires for them to direct the building owners (as they did) to pull down the house of the adjoining owners or to affect to give the adjoining owners the right to build on the party wall to any height they might think fit.

English Harrison, K.C., in reply. The defendants had not ceased to be adjoining owners nor become building owners, for the last clause of s. 95, sub-s. 2, of the Act, which relates to the adjustment of expenses between the building owner and adjoining owner, contemplates an adjoining owner making use of the party wall and executing works upon it.

COLLINS M.R. This is an appeal from an order of Phillimore J. granting an interlocutory injunction at the instance of the plaintiffs, the owners of 33, John Street, to restrain the defendants from building on a party wall between that house and the adjoining house, of which the defendants are the owners. The legislation on the question of the respective rights and liabilities of building owners and adjoining owners in the metropolis has now been settled by the code contained

(1) [1903] 2 K. B. 463.

C. A. 1904

LEADBETTER v. MARYLEBONE CORPORATION.

Collins M.R.

in Part VIII. (ss. 87–101) of the London Building Act, 1894. We had occasion to consider that code minutely in the recent case of *In re Stone and Hastie* (1), and it is not now necessary to again go through the various sections. In the present case the defendants, the freeholders of certain premises, were desirous of erecting a very substantial building next to a house which had some time previously been built by Ecclestone, the plaintiffs' tenant. When Ecclestone was about in 1902 to commence the building of his house, the defendants took steps with a view to the protection of their rights as adjoining owners, and the parties set in motion the machinery of the Act of 1894; Ecclestone as the building owner gave notice to the defendants under s. 90 of his intention to build the wall, while the defendants, as adjoining owners, gave a notice under s. 89 to Ecclestone requiring him to build the party wall in a particular way; the effect of this latter notice was to impose on the building owners the obligation to conform to the suggestions or requisitions of the adjoining owners, or to go to arbitration if any difference arose between them as to the nature of the works to be executed. A difference did arise, and an arbitration took place under s. 91 of the Act, the question for the arbitrators being how far the adjoining owners were right in the requisitions or demands made by them upon the building owner. The award not only adjusted these differences between the parties, but purported to go a great deal farther; it purported to give the adjoining owners the right, not merely to the special securities in regard to the erection of the party wall by the building owner which are given by s. 89, but also to deal with the future relations of the adjoining owners to the party wall, by giving them the right at any time to increase its height. No proceedings were taken at the time by way of impeaching that part of the award, but the time came when the defendants, the adjoining owners, became themselves desirous of building on the top of the party wall, and the plaintiffs contended that, if they wished to do so, they must put the machinery of the Act in operation by giving the usual building owner's notice in the case of a party structure. To

(1) [1903] 2 K. B. 463.

this view the defendants demurred, contending that they were not bound to follow the procedure of the Act, inasmuch as they had power under the award to build on the party wall. The plaintiffs thereupon brought this action to restrain the defendants from building on the party wall without serving a building owner's notice under the Act; and Phillimore J. in granting an interlocutory injunction held that the award, being a statutory award only, could not confer on the defendants as adjoining owners the right of building on the party wall, but that the jurisdiction of the arbitrators was limited to specifying the special requisitions as to dimensions and otherwise which were to be imposed upon the building owners when building the party wall.

The question which now arises is, what were the rights of the parties at the time when the defendants, who were originally adjoining owners, became desirous of building upon the party wall? To put it shortly, I think that the defendants, from having been adjoining owners, then became building owners. By s. 5, sub-s. 31, of the Act the expression "building owner" means (inter alia) "such one of the owners of buildings, storeys, or rooms separated from one another by a party wall or party structure as does, or is desirous of doing, a work affecting that party wall or party structure"; therefore, when the defendants made up their minds to carry up the party wall to a greater height, they became building owners within that definition, and when they wanted to exercise their right they came under the same obligation to the plaintiffs, their adjoining owners, as Ecclestone had been under to themselves; in other words, they came under the code applicable to building owners, and under s. 89 the plaintiffs could enforce the rights of adjoining owners. In addition, s. 90 materially safeguards the rights of the adjoining owner by providing for giving notice of the work which the building owner proposes to execute; it is those rights which the plaintiffs wish to enforce in the present action, and I think that they are right in their contention that they are entitled to a building owner's notice from the defendants before they begin to build on the party wall. Reliance is placed by the defendants upon s. 91,

C. A. 1904

LEADBETTER v. MARYLEBONE CORPORATION.

Collins M.R.

which gives the surveyors "power by his or their award to determine the right to do and the time and manner of doing any work, and generally any other matter arising out of or incidental to such difference." It is contended that the section clothes the surveyors, who are deciding as to the conditions under and mode in which a party wall shall be built, with jurisdiction to deal with what is to be done after the wall has been built, and with jurisdiction to allow the adjoining owner at some future date to build upon it without giving the notice or resorting to the machinery prescribed by the Act. But, in the first place, s. 91 is expressly and in terms limited to matters referred to in the notice; it does not give the surveyors general jurisdiction over every dispute which may arise between the parties, but only over disputes "in respect of any matter arising with reference to any work to which any notice given under this part of the Act relates"; it cannot oust the fresh jurisdiction of a fresh surveyor in a case where the person who was originally an adjoining owner has turned himself into a building owner. According to the view put forward by the defendants, when once the jurisdiction of surveyors as to the dimensions of a party wall which the building owner is then proposing to erect has arisen, they may once and for all decide what is to be done as regards the wall when the position of the parties is reversed and the adjoining owner wants to build upon it; but, in my judgment, the code laid down in the Act necessarily negatives this contention, which would sweep away all the provisions contained in the code which were framed in contemplation of the adjoining owner himself becoming the building owner. I think, therefore, that the jurisdiction which the surveyors had over the dispute was a strictly limited jurisdiction, and that they have exceeded it in that part of their award which has been impugned.

The defendants also relied on the last clause of s. 95, which provides that, "if at any time the adjoining owner make use of any party structure or external wall, or any part thereof, raised as aforesaid beyond the use thereof made by him before the alteration, there shall be borne by the adjoining owner from time to time a due proportion of the

expenses (having regard to the use that the adjoining owner may make thereof):—(i.) of raising such party structure"; they contended that it contemplated what happened in the present case—that is, the adjoining owner making a greater use of the party wall by building upon it than before the alteration, and that, therefore, the award was within the jurisdiction of the surveyors. But the answer to this suggestion has been supplied by my brother Stirling, who pointed out that the section does not deal with an alteration of, or addition to, a party wall, but with claims to make a greater use of a party wall of dimensions already fixed, in which cases provision as to the mode in which the expenses are to be borne is made by the section. In other words, the section contemplates only the use to which the party wall may be applied, and has no application to building operations, to which different provisions are applicable; where fresh building operations are contemplated, there must be a building owner's notice. I think, therefore, that the surveyors had no jurisdiction to decide any question as to the right of the defendants to build on the party wall; that that part of their award was, therefore, made without jurisdiction, and that the parties are left to the code provided by the statute. The appeal must, therefore, be dismissed.

STIRLING L.J. I am of the same opinion, and entirely adopt the view taken by my Lord. The opposite view would in my judgment deprive the adjoining owner of the benefit of the express statutory provisions passed for his protection. The plaintiffs and the defendants were respectively the freeholders of adjoining houses. In 1902 a tenant of the plaintiffs was desirous of erecting a building in accordance with a building agreement into which he had entered: this involved the giving of the necessary statutory notices, whereupon the defendants, as adjoining owners, asserted their rights under s. 89, and required certain things to be done and certain requisitions to be complied with by the tenant when building or rebuilding the party wall. The requirements of the defendants were not acquiesced in, and the dispute between the parties was submitted to the arbitration

C. A. 1904

LEADBETTER v. MARYLEBONE CORPORATION.

Stirling L.J.

of certain surveyors, whose award provided for the settlement of the dispute as to the mode in which the party wall was to be built, and went on to provide that the defendants might at any time, with or without notice, raise the height of the party wall as they might desire. Some time afterwards the defendants proceeded to build, and they contend that they were entitled to raise the party wall as they might think fit in accordance with the terms of the award. But this in my opinion cannot be so. Sect. 89 was passed for the benefit of adjoining owners, who are entitled to require various works to be done by a building owner who is building or altering a party wall, one of which (I mention it by way of illustration) is to build the requisite chimneys. Suppose that in 1902 the defendants had required the plaintiffs' tenant to provide chimneys, then, if the award is good, the defendants would in this respect be emancipated from the obligations of a building owner, and it will be possible for them to raise the party wall to any height without building corresponding chimneys. This seems to me to be impossible. I need not go through the sections of the Act, but I may say that the last clause of s. 95 seems to deal with expenses, and their incidence, where there is increased user of a party wall by the adjoining owner. It deals with expenses only, and does not affect the question we are considering.

MATHEW L.J. I am of the same opinion. The right to make an award springs from the notice given by the building owner, and the surveyors had jurisdiction over the matters contained in that notice and in the notice given by the adjoining owner. But subsequently there was a change, and the original building owner became an adjoining owner, while the original adjoining owner became a building owner. It is said that the statute meant that under such circumstances all the rights of both parties were to be dealt with in the award; but it is clear upon the sections which have been referred to that no such case was contemplated by the Legislature. I am clearly of opinion that the defendants, being now in the position of building owners, must conform with the require-

ments of the Act and must give the necessary building owner's notice.

Appeal dismissed.

C. A. 1904

LEADBETTER v. MARYLEBONE CORPORATION.

Solicitors for plaintiffs: *W. Stubbs.*

Solicitors for defendants: *Mackrell, Maton, Godlee & Quincey.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A. 1904 *Aug.* 10.

TOWER JUSTICES *v.* CHAMBERS AND OTHERS.

Licensing Acts—Licence—Conviction—Forfeiture of Licence—Application for Grant or Transfer—Discretion of Licensing Justices to refuse—Alehouse Act, 1828 (9 *Geo.* 4, *c.* 61), *s.* 14—*Wine and Beerhouse Act*, 1869 (32 *& 33 Vict. c.* 27), *ss.* 8, 19—*Licensing Act*, 1874 (37 *& 38 Vict. c.* 49), *s.* 15.

A beerhouse licence, which had been continuously renewed in respect of premises licensed prior to May 1, 1869, was forfeited by reason of the conviction of the holder for selling spirits without a licence. The owners subsequently applied at a special licensing sessions under s. 15 of the Licensing Act, 1874, for a grant of a licence in respect of the premises to another tenant:—

Held, that the licence was not "in force" within the meaning of s. 19 of the Wine and Beerhouse Act, 1869, at the date of the application, and that therefore the licensing justices had a general discretion to refuse the application, and were not limited to the four grounds of refusal specified in s. 8 of that Act.

Ex parte Flinn & Sons (*No.* 2), [1899] 2 Q. B. 607, discussed and disapproved.

APPEAL from the decision of a Divisional Court upon a special case stated by the Court of quarter sessions for the county of London, upon the hearing of an appeal against the refusal of licensing justices to grant a certificate for a licence to sell beer and wine on or off the premises. The case was in substance as follows.

A beerhouse, known as the Coach and Horses, had been licensed prior to May 1, 1869, for the sale of beer and wine to be consumed on or off the premises, and the licence had from time to time been continuously renewed down to the general

C. A. 1904

TOWER JUSTICES v. CHAMBERS.

annual licensing meeting in February, 1903, when it was renewed to Joseph Arch, the then tenant. In July, 1903, proceedings were instituted by the excise authorities against Arch for selling spirits without a licence, and on July 30 Arch was convicted for the first time of that offence. Upon the conviction the beerhouse was closed for the sale of beer and wine, and it was not again opened until after the hearing of the appeal to quarter sessions mentioned below. On September 18, 1903, an application was made to a metropolitan police magistrate by the owners of the beerhouse, pursuant to s. 15 of the Licensing Act, 1874, for authority to one Coburn to carry on the same business on the same premises until the then next special sessions for licensing purposes, but at the magistrate's suggestion the application was withdrawn. At the next special sessions of the Tower Division for licensing purposes, held on September 28, 1903, an application under s. 15 of the Licensing Act, 1874, was made by the owners for the grant of a licence for the sale of beer and wine by retail in respect of the Coach and Horses to Coburn, who was then the real resident holder and occupier of the beerhouse. The application was refused by the licensing justices upon grounds other than one of the four grounds specified in s. 8 of the Wine and Beerhouse Act, 1869. Against this refusal the owners and Coburn duly appealed to quarter sessions. It was contended on behalf of the licensing justices that they had jurisdiction to refuse the grant of a licence to Coburn upon grounds other than one or more of the four grounds specified in s. 8 of the Act of 1869, while on behalf of the owners it was contended that the jurisdiction of the licensing justices to refuse the grant was limited to one or more of those four grounds. The Court of quarter sessions were of opinion that the contention of the owners was right, and allowed the appeal.

The question for the opinion of the Court was whether, upon the facts above stated, the licensing justices had jurisdiction to refuse the grant of a licence to Coburn upon any ground other than one or more of the four grounds specified in s. 8 of the Act of 1869.

The Divisional Court (Lord Alverstone C.J., Wills and

Kennedy JJ.) held, upon the authority of *Ex parte Flinn & Sons (No. 2)* (1), that the licensing justices had no jurisdiction to refuse the application upon any ground other than those specified in s. 8. The present appeal was then brought by the licensing justices. (2)

F. Low, K.C. (*R. D. Muir* and *Leycester* with him), for the appellants. The justices had an absolute discretion to refuse

(1) [1899] 2 Q. B. 607.

(2) By 9 Geo. 4, c. 61 (the Alehouse Act, 1828), s. 14, if a licensed person before the expiration of the licence (inter alia) dies, or is rendered incapable by sickness or other infirmity of keeping an inn, power is given to licensing justices at special sessions to grant to his assigns a licence to sell excisable liquors by retail.

By 3 & 4 Vict. c. 61 (the Beerhouse Act, 1840), s. 7, "Every person who shall hereafter be lawfully convicted of felony, or of selling spirits without licence, shall for ever thereafter be disqualified from selling beer and cider by retail, and no licence to sell beer and cider by retail under the said recited Acts or this Act shall be granted to any person who shall be so convicted as aforesaid; and if any such person shall, after having been so convicted as aforesaid, take out or have any licence to sell beer or cider by retail under the said recited Acts or this Act, the same shall be void to all intents and purposes"

By 32 & 33 Vict. c. 27 (the Wine and Beerhouse Act, 1869), s. 8, an application for a certificate in respect of a licence to sell by retail beer, cider, or wine not to be consumed on the premises is not to be refused, except upon one or more of four specified grounds. By s. 19 of the same Act, as amended by 33 & 34 Vict. c. 29 (the Wine and Beerhouse Amendment Act, 1870), s. 7, where, on May 1, 1869, a licence is in force, and has been renewed from time to time, with respect to a house or shop for the sale by retail of beer, cider, or wine to be consumed on the premises, the justices may only refuse an application for a certificate for the sale of beer, cider, or wine to be consumed on the premises upon one or more of the grounds specified in s. 8.

By 37 & 38 Vict. c. 49 (the Licensing Act, 1874), s. 15, "Where any licensed person is convicted for the first time of" (inter alia) "selling spirits without a spirit licence, and in consequence either becomes personally disqualified or has his licence forfeited, there may be made by or on behalf of the owner of the premises an application to a Court of summary jurisdiction for authority to carry on the same business on the same premises until the next special sessions for licensing purposes, and a further application to such next special sessions for the grant of a licence in respect of such premises, and for this purpose the provisions contained in the Intoxicating Liquor Licensing Act, 1828, with respect to the grant of a temporary authority and to the grant of licences at special sessions shall apply as if the person convicted had been rendered incapable of keeping an inn, and the person applying for such grant was his assignee."

C. A. 1904

TOWER JUSTICES v. CHAMBERS.

the application, and were not limited to the four grounds of refusal specified in s. 8 of the Wine and Beerhouse Act, 1869. Upon the conviction of the licensee for selling spirits without a licence, the beerhouse licence became forfeited under s. 7 of the Beerhouse Act, 1840 (3 & 4 Vict. c. 61); it was, therefore, not "in force" within the meaning of s. 19 of the Act of 1869 at the date of the application to the licensing justices under s. 15 of the Licensing Act, 1874. The case of *Ex parte Flinn & Sons (No. 2)* (1), which was followed by the Divisional Court and is against the view of the licensing justices, was wrongly decided; it was argued upon one side only, and the previous decision of *Reg.* v. *West Riding Justices* (2), which is to a contrary effect, was not brought to the notice of the Court; the first-named decision should not be followed, and, if necessary, should be overruled. The only distinction between the present case and *Reg.* v. *West Riding Justices* (2) is that the offence of keeping a brothel is not one of the cases provided for by s. 15 of the Licensing Act, 1874, whereas selling spirits without a licence is; but that distinction is immaterial for the purpose of the present argument, and the decision should be followed. The licence, being forfeited by the conviction, is absolutely gone, and cannot be preserved in a state of suspended animation for the benefit of the owner; the contrary contention is disposed of by the decision in *Freer* v. *Murray* (3), the judgment of Lord Herschell being emphatic upon that point. That case is exactly in point, the only difference being that there the break in continuity was caused by the lapse of the licence, while here it was caused by its forfeiture, which is an a fortiori case. The word "assignee" at the end of s. 15 of the Licensing Act, 1874, upon which reliance was placed by the other side, has the same meaning as "assign" in s. 14 of the Alehouse Act, 1828, and refers to the assignee of the premises, and not to a person who may be called the assignee of the licence. Sect. 15 of the Licensing Act, 1874, does not operate to cut down the provision of s. 19 of the Wine and Beerhouse Act, 1869, as to a licence being "in force" at the date of the

(1) [1899] 2 Q. B. 607. (2) (1888) 21 Q. B. D. 258.
(3) [1894] A. C. 576.

application; it merely gives power in certain cases to make use of the machinery provided by s. 14 of the Alehouse Act, 1828; in other words, the locus standi to apply for relief which is given by s. 15 of the Licensing Act, 1874, cannot apply where there has been a fatal break in the licence. [He also cited *Reg.* v. *Vine* (1); *Reg.* v. *Curzon* (2); *Hargreaves* v. *Dawson.* (3)]

Foote, K.C., and *Bruce Williamson*, for the respondents. The Divisional Court was right in holding that the licensing justices were limited to the four grounds of refusal specified in s. 8 of the Act of 1869. Reliance is placed on s. 15 of the Licensing Act, 1874, but for which section the owner of licensed premises, in case of the forfeiture of the licence, would have no remedy at all; the section only applies where there has been a forfeiture. Apart from that section, the only case where an application can be made after expiry of the licence is that provided for by s. 14 of the Alehouse Act, 1828, where the tenant, being about to leave the premises, has omitted to apply for a renewal. The case of *Reg.* v. *West Riding Justices* (4) is not in point; s. 15 of the Licensing Act, 1874, had no application in that case, the licence having been ipso facto forfeited by the conviction for keeping a brothel, an offence for which no protection was afforded to the owner by that or any other section. Nor is *Freer* v. *Murray* (5) an authority, for no question as to the effect of s. 15 of the Act of 1874 arose, or could arise, in that case; the renewal of the licence had been properly refused, and the licence had expired by effluxion of time before the application for a transfer. No doubt the result of the authorities is that, where a licence has actually ceased to exist, an application under s. 14 of the Alehouse Act, 1828, is subject to the general discretion of the licensing justices, and may be refused on grounds other than the four specified in s. 8 of the Act of 1869. But it is otherwise where the application is made under s. 15 of the Licensing Act, 1874; in such a case the licence is, as regards the owner, not to be considered as

(1) (1875) L. R. 10 Q. B. 195.
(2) (1873) L. R. 8 Q. B. 400.
(3) (1871) 24 L. T. (N.S.) 428.
(4) 21 Q. B. D. 258.
(5) [1894] A. C. 576.

C. A. 1904

TOWER JUSTICES v. CHAMBERS.

forfeited, but the case is to be looked upon as if the licensee had been rendered incapable of keeping an inn within the meaning of s. 14 of the Alehouse Act, 1828, and the applicant, that is, the owner, were his assign.

Secondly, it is contended that the licence was not forfeited by reason of the conviction. Prior to 1869 a certificate of justices was not required in the case of a beerhouse, an excise licence alone being granted; assuming, therefore, that there was a forfeiture at all under s. 7 of the Beerhouse Act, 1840, it was the excise licence only, and not the justices' certificate or licence, which was forfeited; the latter was still alive at the date of the application. Under s. 74 of the Licensing Act, 1872, "licence" includes a certificate of justices under the Wine and Beerhouse Acts, and under s. 3 of the Licensing Act, 1872, disqualification for holding a licence on the ground of a conviction for selling intoxicating liquors without a licence only arises upon a second conviction; there having been only one conviction in the present case, the justices' licence or certificate was still in force at the date of the application. Therefore the effect of s. 7 of the Act of 1840 was not to forfeit the licence, but to work a personal disqualification of the licensee from selling intoxicating liquors on the premises under the licence, while the owner is left at liberty to apply under s. 15 of the Licensing Act, 1874, and his application can only be refused on one of the four grounds in s. 8 of the Act of 1869. The word "assignee" in s. 15 of the Licensing Act, 1874, means the assignee of the tenant's right in the premises.

[They also cited *Reg.* v. *Liverpool Justices* (1); *Mackrell* v. *Brentford Justices.* (2)]

F. Low, K.C., in reply.

COLLINS M.R. This appeal raises the question whether in the circumstances of the particular case the owners of a beerhouse which had been licensed before the coming into operation of the Wine and Beerhouse Act, 1869, are entitled to the benefit of the provisions of s. 14 of the Alehouse Act, 1828. The licence had been continuously renewed down to 1903, in

(1) (1883) 11 Q. B. D. 638. (2) [1900] 2 Q. B. 387.

July of which year the licensee was convicted, for the first time, of selling spirits without a licence. In September the owners applied at the special licensing sessions for a transfer of the licence to their nominee, the new tenant of the premises, and this being refused they appealed to quarter sessions upon the point that the licensing justices could only base their refusal upon one of the four grounds specified in s. 8 of the Act of 1869, and that they, the owners, were entitled to the protection of that section. The Court of quarter sessions held that that was the true view, and allowed the appeal, and the Divisional Court, on the authority of *Ex parte Flinn* (*No.* 2) (1), affirmed their decision. I do not gather, however, that the learned judges in the Divisional Court were convinced by the decision in *Ex parte Flinn* (*No.* 2) (1); they thought that it was in point (as it clearly was), and that they were bound by it.

The question we have now to consider is whether the owners are entitled to the benefit of s. 14 of the Alehouse Act, 1828, as amended and applied by s. 15 of the Licensing Act, 1874. We must first turn to s. 19 of the Act of 1869, which deals with the renewal of then existing indoor licences, and for convenience I read that section as it appears on p. 407 of Paterson's Licensing Acts, incorporating the amendments introduced by s. 7 of the Wine and Beerhouse Act, 1870; it runs thus: "Where, on May 1, 1869, a licence under any of the said recited Acts is in force [and has been renewed from time to time, whether held by the same person or not, or has been or may be transferred to any other person or persons (33 & 34 Vict. c. 29, s. 7)] with respect to any house or shop for the sale by retail therein of beer, cider, or wine to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, cider, or wine to be consumed on the premises in respect of such house or shop, except upon one or more of the grounds upon which an application for a certificate under this Act in respect of a licence for the sale of beer, cider, or wine, not to be consumed on the premises, may be refused in accordance with this Act." Those

(1) [1899] 2 Q. B. 607.

C. A. 1904

TOWER JUSTICES v. CHAMBERS.

Collins M.R.

grounds, which are well known, are to be found in s. 8 of the Act, and the ground upon which this licence was refused is not one of them. The licences referred to in s. 19 were excise licences, for up to that date no certificate of justices was necessary in the case of a beerhouse licence, and the conditions imposed by the section have reference primarily to an excise licence and not to a justices' certificate. Then comes s. 15 of the Licensing Act, 1874, which provides for the temporary continuance of licences forfeited for single offences, and enacts that "where any licensed person is convicted for the first time of" (inter alia) "selling spirits without a spirit licence, and in consequence either becomes personally disqualified or has his licence forfeited, there may be made by or on behalf of the owner of the premises an application to a Court of summary jurisdiction for authority to carry on the same business on the same premises until the next special sessions for licensing purposes, and a further application to such next special sessions for the grant of a licence in respect of such premises, and for this purpose the provisions contained in the Intoxicating Liquor Licensing Act, 1828, with respect to the grant of a temporary authority and to the grant of licences at special sessions shall apply as if the person convicted had been rendered incapable of keeping an inn and the person applying for such grant was his assignee." That takes us back to s. 14 of what is better known as the Alehouse Act, 1828, the first clause of which provides that "if any person duly licensed under this Act shall before the expiration of such licence die, or shall be by sickness or other infirmity rendered incapable of keeping an inn it shall be lawful for the justices assembled as aforesaid at a special session holden under the authority of this Act for the division or place in which the house so kept or having been kept shall be situate to grant to the heirs, executors, or administrators of the person so dying, or to the assigns of such person becoming incapable of keeping an inn a licence to sell excisable liquors by retail to be drunk or consumed in such house or the premises thereunto belonging."

It is contended on behalf of the licensing justices that in the circumstances of the present case the owners, who made their

application after the tenant's licence had come to an end, were incompetent to benefit by the provisions of the Act of 1869, and could not bring themselves within the conditions imposed. Whether this contention is right depends upon whether it is a condition to the right to make such an application that the licence of a beerhouse originally licensed before 1869 must have been continuously renewed up to the date of the application, and that there must have been no break in the existence of the licence; and, if this be so, then reliance is placed on the forfeiture, which caused the licence to cease to exist. It is contended by the owners, with regard to s. 15 of the Act of 1874, that its effect is not merely to put a person in the same position as he would be in under the Alehouse Act, 1828, but that he is put in a special position as though he had been rendered incapable of keeping an inn, and that he is relieved from the burden of shewing that the licence has existed continuously since 1869; in other words, that by giving the owner the same right as in the case of a person rendered incapable of keeping an inn, the Legislature has removed the disability created by the antecedent forfeiture. It has been frequently held, apart from the question of the operation of s. 15 of the Licensing Act, 1874, that unless the applicant could shew that the licence was in existence at the date of the application, he was ousted from his right to the special advantages secured by the Act of 1874, though his right to make the application was not affected. This is emphasized in *Murray* v. *Freer* (1) by Lord Esher M.R., who says: "We have to construe two sections in two Acts of Parliament. The first is s. 14 in the Act 9 Geo. 4, c. 61. It is admitted on all hands that s. 14 includes the present case up to a certain point —that it gave the respondent a locus standi before the justices to apply for a transfer. I entirely agree in that view. But does s. 14 do any more than that? It appears to me that, if you read the section over and over again, you cannot say that it does anything more than provide who are to be proper applicants; it makes no provision for what the justices are to do with the application when it is made." And again

(1) [1893] 1 Q. B. 635, at p. 641.

C. A. 1904

TOWER JUSTICES v. CHAMBERS.

Collins M.R.

he says (1), in reference to s. 19 of the Act of 1869: "The grammar of that clause is very insufficient unless the words mean 'was on the 1st of May, 1869, and has since continued, and still is, in force.' I should have thought that was the true construction, even if s. 19 had stood alone. But s. 7 of the Act of 1870 appears to treat s. 19 as having the meaning which I should have attributed to it independently. Then again, in both *Hargreaves* v. *Dawson* (2) and *Reg.* v. *Curzon* (3), the words 'is in force' were construed as meaning 'was in force on the 1st of May, 1869, and has continued in force up to, and is in existence at, the time when the application is made. Unless we can overrule those cases, that is the true construction. In my opinion we cannot overrule them, and they govern the present case." If s. 15 of the Licensing Act, 1874, only defines the class of applicants and admits the owner into that class where the licence is forfeited, it is obvious that the owner is not emancipated from the condition applicable to all other applicants—that is, that the licence must have been continuously in existence up to the time of the application—and that is the view which I take of its meaning. The case of *Murray* v. *Freer* was ultimately affirmed in the House of Lords (4), but it is unnecessary to discuss the decision in detail, for it is admitted on behalf of the owners that to an application made under the Act of 1828 it is a good answer to shew that the licence has been determined. On the question of the construction of the section I cannot accede to the contention that it gives the owner, in cases of forfeiture of the licence, the special privilege of not having to prove what other applicants would have to prove; in my opinion it only operates to place the owner in the list of persons having a locus standi to make an application, and does not emancipate him from the necessity of shewing the continuous renewal of the licence; the main contention on behalf of the owners therefore fails.

I come now to the authorities, and the case of *Ex parte Flinn & Sons (No. 2)* (5) seems to be directly in point. But the

(1) [1893] 1 Q. B. at p. 642.
(2) 24 L. T. (N.S.) 428.
(3) L. R. 8 Q. B. 400.
(4) Sub nom. *Freer* v. *Murray*, [1894] A. C. 576.
(5) [1899] 2 Q. B. 607.

decision is not very satisfactory, for the case was argued on one side only, and the learned judges expressed their regret at the absence of a full argument. No reasons were given by Darling J. for his decision, and while Phillimore J. went into the question in more detail, the view which he took does not seem to be in accordance with the law laid down in *Freer* v. *Murray*. (1) The learned judge says (2): "No doubt there is some awkwardness in saying that a licence has been forfeited and yet that it can be assigned or carried on; but the awkwardness is, I think, only verbal, and when s. 15 comes to be looked at as a whole it appears that the licence is to be regarded as only forfeited in respect to the licensee, but as capable of being kept alive in favour of the owner." In my opinion that assumes that what the Court of Appeal and the House of Lords said in *Freer* v. *Murray* (3) was not law, and that a licence may be in a state of suspended animation, the licensee being debarred from making any use of it although the licence itself remains alive; this is clearly contrary to the view of the highest tribunal. A licence involves the idea of a person who is to be the licence-holder and also of a place fit for its use, and if the only person who can make use of it forfeits his interest, it is impossible to say that the licence continues to exist. Lord Herschell in his judgment in *Freer* v. *Murray* (1) emphasized the view that it was impossible for a licence to exist in a state of suspended animation. I think therefore that the view taken by the Divisional Court was wrong, and that on the main point the contention of the licensing justices is correct.

Then comes the second point: that, even if the correct view of the law is that the benefit of s. 15 of the Act of 1874 can only be enjoyed where the licence can be shewn to have continuously existed up to the date of the application, the licence in the present case was in existence at that date. The contention was that it was only the excise licence which came to an end, and that the justices' certificate remained untouched; that the justices' certificate was the material

(1) [1894] A. C. 576. (2) [1899] 2 Q. B. at p. 611.
(3) [1893] 1 Q. B. 635; [1894] A. C. 576.

C. A. 1904

TOWER JUSTICES v. CHAMBERS.

Collins M.R.

licence for the present purpose, and that under the Licensing Act, 1872, a single conviction did not involve a forfeiture of that licence. But when we look at the conditions imposed by the Act of 1869, and remember that by s. 19 the licence there spoken of must be in force at the date of the application, it seems clear that the licence there referred to is the excise licence and nothing else, for the justices' certificate was only introduced for the first time by that Act. In my view, therefore, the excise licence must continue in force down to the date of the application, and if that licence has been forfeited the conditions of the Act of 1869 cannot be complied with, and the privilege hitherto attaching to the licence is at an end. It was urged before us that there had been no forfeiture of the licence, and the argument was based upon s. 7 of the Beerhouse Act, 1840, which provides that "every person who shall hereafter be lawfully convicted of selling spirits without licence shall for ever thereafter be disqualified from selling beer and cider by retail, and no licence to sell beer and cider by retail under the said recited Acts or this Act shall be granted to any person who shall be so convicted as aforesaid; and if any such person shall, after having been so convicted as aforesaid, take out or have any licence to sell beer or cider by retail under the said recited Acts or this Act, the same shall be void to all intents and purposes" It was contended that that clause, although it defeats the capacity of the licensed person to sell under the licence, leaves the licence itself in existence; but it seems to me that the natural meaning of the words is that the licence itself is destroyed, for it is to be void to all intents and purposes. The making void the licence is equivalent to a forfeiture; and, if that is so, it is impossible to say that the licence was in force continuously down to the date of the application. In my opinion, therefore, the appellants are entitled to succeed upon both the grounds urged before us.

STIRLING L.J. I have come to the same conclusion, and will state very shortly the grounds for the opinion which I have formed. The question arises in regard to a beerhouse

which, prior to May 1, 1869, was licensed for the sale of beer by retail for consumption on or off the premises. The licence was continuously renewed down to 1903, and on July 30 of that year Arch, the then tenant and licence-holder, was convicted of selling spirits without a licence, by which he became disqualified from holding his beerhouse licence. In September an application was made by the owners, under s. 15 of the Licensing Act, 1874, for a transfer of the licence to Coburn. [The Lord Justice read the section.] I may here point out that the section applies in cases where the licence-holder is convicted for the first time, and that it therefore removes from our consideration the question which would arise under s. 3 of the Licensing Act, 1872, by which a forfeiture of the licence for the offence of selling intoxicating liquors without a licence only arises on the second conviction. The authority given by s. 15 of the Licensing Act, 1874, is an authority to make an application under s. 14 of the Alehouse Act, 1828, "as if the person convicted had been rendered incapable of keeping an inn, and the person applying for such grant was his assignee." At one time I was disposed to think that the word "assignee" as there used meant the assignee of the licence, but upon a careful consideration of the various sections I have come to the conclusion that the view urged by the counsel for the appellants is correct, that the section is there dealing with one of the events specified in s. 14 of the Act of 1828, where provision is made for the transfer of the licence in case of the sickness of the licence-holder and of other events affecting him personally, and that "assignee" means the person described in s. 14 as the assign of the premises or interest of the person licensed. It was contended on behalf of the owners that s. 15 of the Act of 1874 was a remedial section, and that it was intended not merely to give power to make an application for a transfer or grant of the licence, but also to give the same benefit as would attach to an application in respect of a beerhouse licence in existence on, and continuously renewed since, May 1, 1869, as though there had been no disqualification of the licence-holder or forfeiture of the licence by reason of the conviction. But

C. A. 1904

TOWER JUSTICES v. CHAMBERS.

Stirling L.J.

there are no words to that effect in s. 15 of the Licensing Act, 1874, nor can I see any reason for reading them into the section, which merely gives the owner the right to make the application—a right which, in my opinion, is subject to all the conditions which would be applicable in the case of any other applicant.

The other question raised before us is as to the effect of the conviction upon the licence. This depends upon s. 7 of the Beerhouse Act, 1840, which applies to the grant of excise licences; and it not only disqualifies the person convicted from selling beer, but makes void to all intents and purposes any licence which he might at any time take out or have. I think that the section means that not merely any future licence that he might take out, but also the licence which he held at the time of the conviction, should be forfeited, and the case of *Reg.* v. *Vine* (1) is a strong authority in favour of this view, for it was decided upon a section almost identical in its terms with that under consideration. The result is, therefore, that the excise licence became void on the conviction of Arch and ceased to exist. The owners now seek to avail themselves of the benefits conferred in the case of beerhouses licensed before May 1, 1869; but in order to be entitled to take up that position they must shew, not merely that the licence has been continuously renewed since that date, but also that it was in force at the date of the application. This they cannot do. The licence was not in force when the application was made to the special sessions, for it had ceased to exist upon the conviction of the licence-holder. I think, therefore, that *Freer* v. *Murray* (2) is in point, and that the owners are not entitled to the protection of s. 19 of the Act of 1869.

MATHEW L.J. I am of the same opinion, and I base my decision both upon what I consider to be the plain language of the Act of Parliament and upon the decision of the House of Lords in *Freer* v. *Murray*. (2) In that case the renewal of a beerhouse licence had been refused owing to the opposition of the superintendent of police, and it was held that the innocent

(1) L. R. 10 Q. B. 195. (2) [1894] A. C. 576.

owner was not entitled to have the title transferred to another tenant for the reason that the licence had not been in force continuously down to the date of the application. The counsel for the respondents have quite failed to make out that the owner stands in a better position than any other applicant, or that the law laid down in *Freer* v. *Murray* (1) is not applicable. I agree that this appeal should be allowed.

C. A. 1904

TOWER JUSTICES v. CHAMBERS.

MATHEW L.J.

Appeal allowed.

Solicitor for appellants: *E. W. Beal.*

Solicitors for respondents: *Maitlands & Peckham.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A. 1904 *Nov.* 11.

In re SOLOMONS. *Ex parte* SOLOMONS.

Bankruptcy—Practice—Trustee's Record Book—Right of Debtor to inspect—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 80—*Bankruptcy Rules*, *rr.* 16, 285, 287, 292.

A debtor has no right under any circumstances to inspect the record book of the trustee in his bankruptcy, and the Court has no power to give him leave to do so.

Decision of Bigham J., ante, p. 760, affirmed.

APPEAL from the decision of Bigham J. (2)

The facts are fully stated in the former report, and it appears sufficient now to state that the debtor applied to the Court that he might be at liberty to inspect the "record book" of the trustee in his bankruptcy. A first and final dividend had been paid, the trustee had passed his accounts and had been discharged, and he had handed over his "record book" and all other documents to the official receiver.

The debtor's order of discharge had been suspended for six years from January 17, 1899. (3)

The object of the application was to enable the debtor to

(1) [1894] A. C. 576. (2) Ante, p. 760.

(3) Vide [1904] 1 K. B. 106.

C. A. 1904

SOLOMONS, *In re.* SOLOMONS, *Ex parte.*

shew that (as he alleged) the trustee had been guilty of perjury in some of the proceedings in the bankruptcy.

Bigham J. refused the application. He was of opinion that it would be contrary to the practice of the Court to permit the inspection, and he was not satisfied by the debtor's affidavit that there were any exceptional circumstances which would justify a departure from the practice.

The debtor appealed.

The Appellant in person contended that the Court had a discretion.

[VAUGHAN WILLIAMS L.J. referred to the Bankruptcy Act, 1883, s. 80, and the Bankruptcy Rules, rr. 16, 285, 287, 292.]

Muir Mackenzie, for the official receiver, was not called upon.

VAUGHAN WILLIAMS L.J. The only question which we have to decide is whether the debtor has a right to inspect this "record book." Having regard to the Act and the Rules, it is in my opinion manifest that the debtor has no right to this inspection under any circumstances, and we have no power to make the order for which he asks. If he desires to examine the proceedings of the Court he can under rule 16 obtain office copies of them. The appeal must be dismissed with costs.

ROMER L.J. and COZENS-HARDY L.J. concurred.

Appeal dismissed.

Solicitor for official receiver: *Solicitor to Board of Trade.*

W. L. C.

END OF VOL. II.